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Supreme Court, U.S.
FILED

No. _____

071073 FEB 15 2008

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# In The Supreme Court of the United States

JOHN CRANE INC.,

*Petitioner,*

v.

SANDRA KAY ONEY,
EXECUTOR OF THE ESTATE OF
SHARON VAUGHN ONEY, DECEASED,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Under general maritime law, should damages in an asbestos liability wrongful death action be apportioned pursuant to a limited joint and several liability approach, under which nonsettling defendants, settling defendants, entities not named as party defendants, and bankrupt entities are placed on a jury's verdict form?

This question should be answered in the affirmative.

2. Under Article III, Section 2 of the United States Constitution, should maritime law be applied to wrongful death actions, based on a failure to warn, that are filed against land-based manufacturers of asbestos-containing products by private employees servicing ships in navigable waters?

This question should be answered in the negative.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, John Crane Inc. certifies that it is an indirect wholly-owned subsidiary of Smiths Group plc, a public company traded on the London Stock Exchange.

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## OPINIONS AND ORDERS RELEVANT TO APPEAL

1. John Crane Inc. v. Oney, Record No. 071861, Supreme Court of Virginia, Denial of Petition for Appeal, December 19, 2007 (App. 1a).

2. Oney v. John Crane Inc., Circuit Court for the City of Newport News, Virginia, Law No. 00301TF, Final Order, June 12, 2007 (App. 2a-4a).

3. Oney v. John Crane Inc., Circuit Court for the City of Newport News, Virginia, Law No. 00301TF, Memorandum Opinion, May 25, 2007 (App. 5a-14a).

4. Oney v. John Crane Inc., Circuit Court for the City of Newport News, Virginia, Law No. 00301TF, Order, April 1, 2007 (App. 15a-21a).

## NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This Petition is from the Supreme Court of Virginia's denial of John Crane Inc.'s ("John Crane") Petition for Appeal, which both affirmed the Circuit Court for the City of Newport News, Virginia's exercise of federal maritime jurisdiction over Plaintiff's wrongful death action in an asbestos liability lawsuit, and affirmed an apportionment scheme that did not permit the jury to apportion fault to various entities other than John Crane, such as insolvent entities, entities that had established trusts to compensate injured workers and their families, and former defendants who had settled.

Plaintiff, Sandra Kay Oney, the executor of the estate of her husband, Sharon Vaughn Oney ("Decedent"), brought this action against eleven asbestos manufacturers and suppliers, including John Crane.[1] Plaintiff sought damages for John Crane's alleged failure to warn the Decedent of harms associated with asbestos inhalation under strict liability and negligence theories of recovery. Before trial, all other defendants were dismissed, through settlements or voluntary nonsuits, leaving John Crane as the sole defendant at trial.

Prior to trial, John Crane moved the trial court to apply Virginia law rather than federal

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[1] The eleven defendants originally named were Garlock Sealing Technologies, LLC; Waco, Inc.; Metropolitan Life Insurance Company; Foster-Wheeler USA Corporation; SB Decking Co.; Union Carbide Corporation; Warren Pumps, Inc.; Goulds Pumps, Inc.; Buffalo Pumps, Inc.; Crane Company; and John Crane. Crane Company and John Crane are unrelated.

maritime law as invoked by Plaintiff in her Motion for Judgment. John Crane also filed Motions to Apportion Fault of Judgment-Proof Defendants and to Permit the Jury to Apportion Fault to Employer Shipyard. Addressing the same issues, Plaintiff filed a Motion to Apply Joint and Several Liability and Prohibit Allocation of Comparative Fault to Non-Party Entities, and a Motion to Prohibit Evidence Relating to Negligence of Non-Party and/or Bankrupt Companies. At the pre-trial conference on March 16, 2007, Judge Timothy S. Fisher denied John Crane's motions and granted Plaintiff's motions. (Order, April 1, 2007, App. 15a-21a).

Once the trial court had ruled that federal maritime jurisdiction applied to the case, the issue was not argued again. Thereafter, the trial was held daily from March 26, 2007 through April 11, 2007, excluding weekends, before a jury in the Circuit Court of Newport News, Virginia. The parties revisited the question of which apportionment scheme comports with maritime law at the close of evidence, when Plaintiff orally moved the trial court to strike the evidence regarding comparative fault of any alleged tortfeasor other than John Crane or Garlock Sealing Technologies, LLC ("Garlock"). The trial court granted Plaintiff's motion over John Crane's objection.

The jury awarded Plaintiff $9,251,392.06 and found John Crane to be 60% at fault and Garlock 40% at fault. Pursuant to the trial court's rulings before and during trial, these were the only two entities included on the verdict form. The jury awarded $9,000,000 in compensatory damages and

$251,392.06 in medical and funeral expenses but did not award punitive damages. John Crane filed its motion to set aside the verdict on April 23, 2007.

Subsequent to trial, upon hearing post-trial motions on May 8, 2007, Judge Fisher reaffirmed his pre-trial rulings, including his denial of John Crane's Motions to Apply Virginia law, and to Apportion Fault of Judgment-Proof Defendant and to Permit the Jury to Apportion Fault to Employer Shipyard, as well as his granting of Plaintiff's Motions to Apply Joint and Several Liability and Prohibit Allocation of Comparative Fault to Non-Party Entities, and to Prohibit Evidence Relating to Negligence of Non-Party and/or Bankrupt Companies. (Memorandum Opinion, May 25, 2007, App. 5a-14a). On June 12, 2007, the trial court entered a Final Order imposing judgment against John Crane in the amount of $5,550,835, "such amount being the 60% share of the total jury award assigned by the jury" to John Crane. (Final Order, June 12, 2007, App. 2a-4a).

John Crane did not have an appeal of right under applicable Virginia procedures. Thus, on September 12, 2007, John Crane petitioned the Supreme Court of Virginia for an appeal of the trial court's judgment on the grounds that the trial court had improperly asserted maritime jurisdiction under the existing case law of this Court, the Court of Appeals for the Fourth Circuit, and the Supreme Court of Virginia. Additionally, John Crane argued, assuming *arguendo* that maritime law was proper to apply, that the trial court nonetheless improperly prevented the jury from apportioning fault to various entities other than John Crane and Garlock. John

Crane also appealed the trial court's judgment on three issues arising out of state law, none of which are appealed in this Petition. On December 19, 2007, the Supreme Court of Virginia denied John Crane's petition without issuing an opinion. (Denial of Petition for Appeal, Supreme Court of Virginia, December 19, 2007, 1a).

## CONSTITUTIONAL PROVISION AT ISSUE

1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;...—to all Cases of admiralty and maritime jurisdiction". U.S. CONST. art. III, § 2, cl. 1.

## STATEMENT OF THE FACTS

### A. Mr. Oney's Exposure History and Death.

Plaintiff's decedent, Sharon Vaughn Oney ("Mr. Oney"), was employed as a machinist at the Newport News Shipbuilding and Drydock Company (hereinafter "the shipyard") from 1962-1994. (TR, March 27, 2007, 446-48[2] at 111a-114a). He was neither a sailor nor a merchant mariner, but rather was a private citizen working to build and repair ships as an employee of the shipyard. There, between 1962 and 1972, Mr. Oney worked on the construction and overhaul of aircraft carriers and, to a lesser degree, submarines. (TR, March 27, 2007, 449-53 at 114a-19a, 474 at 132-33a, 477-79 at 133a-36a, 487-88 at 139a-141a, 525-26 at 151a-53a). The majority of his time was spent constructing and repairing the catapult portions of nascent aircraft carriers such as the NIMITZ, the KENNEDY, the AMERICA, and the ENTERPRISE. Id. After 1972, Mr. Oney was promoted to supervisor at the shipyard and ceased working regularly as a machinist. (TR, March 27, 2007, 490-91 at 141a-143a). Mr. Oney retired from his job as a supervisor in 1994. (TR, March 27, 2007, 447 at 113a). Throughout his life, Mr. Oney maintained no other employment relevant to this appeal.

Evidence presented at trial established that Mr. Oney worked for nearly ten years as a shipyard

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[2] All citations to the record made in this Petition reference the volume of the transcript on the day the evidence was recorded and the page numbers (i.e., "TR, March 27, 2007, 1-5"), where appropriate, followed by the Appendix page numbers.

machinist in an environment of heavy exposure to asbestos fibers released by a variety of products to which he, and other tradesmen around him, had been exposed on a daily basis, including pipe covering, insulation, gaskets, packing, cloth, cement, boilers, brick, and mud. (TR, March 27, 2007, 456 at 120a-21a, 462-64 at 121a-24a, 469-74 at 127a-33a, 480-81 at 136a-38a, 521-23 at 148a-51a). More specifically, Mr. Oney and several of his former co-workers testified that they were regularly exposed to asbestos-containing products manufactured by Johns-Manville, Flexitallic, Garlock, and John Crane. (TR, March 27, 2007, 456 at 120a-21a, 464-65 at 123a-25a, 468-70 at 125a-28a, 480-81 at 136a-38a, 493-94 at 143a-45a, 517 at 146a-47a, 521-23 at 148a-51a; TR March 28, 2007, 543-45 at 86a-89a, 547 at 89a-90a, 580 at 90a-91a, 586-87 at 91a-93a, 643 at 93a-94a, 646 at 95a, 670-73 at 96a-100a, 677 at 100a-101a). The John Crane products to which Mr. Oney was exposed were pipe gaskets and valve packing.

On January 27, 2006, Mr. Oney was diagnosed with mesothelioma, which his doctors attributed to occupational asbestos exposure. (TR, March 28, 2007, 744-46 at 104a-107a; TR, March 29, 2007, 803-04 at 68a-70a, 814 at 76a). His doctors also testified that all the products to which Mr. Oney was exposed were "significant and substantial, contributing causes to the development of his malignant mesothelioma." (TR, March 29, 2007, 815 at 77a). Mesothelioma is a rare cancer that is almost exclusively attributable to asbestos exposure. (TR, March 28, 2007, 738-40 at 101a-104a). Through September 2006, Mr. Oney received chemotherapy

and radiation therapy. (TR, March 27, 2007, 440 at 110a; TR, April 4, 2007, 1707 at 60a-61a). None of his treatments were successful, and on November 17, 2006, Mr. Oney died at age 65. (TR, March 30, 2007, 1112 at 67a).

Mr. Oney is survived by his wife of 46 years. (TR, March 27, 2007, 438 at 109a). The Oneys had no children. Id. The evidence at trial demonstrated that Mr. Oney was well into retirement at the time of his death but continued to maintain certain investment properties he and his wife rented to the public for supplemental income. (TR, March 27, 2007, 494-95 at 145-46a).

**B. The Lawsuit and Trial.**

On February 21, 2006, Mr. Oney sued thirteen manufacturers and suppliers of asbestos-containing products, including John Crane and Garlock, alleging that each manufactured products to which he was exposed while working at the shipyard and that each manufacturer's product was a substantial contributing factor to causing his mesothelioma. (See Pl.'s Abbrev. Compl. at 380a-84a). After Mr. Oney's death, Plaintiff filed an amended complaint for the wrongful death of her husband, limiting the action to eleven defendants. (See Pl.'s Am. Abbrev. Compl. at 375a-79a).

In its Answer, John Crane asserted several defenses, including that its products did not release sufficient asbestos fibers to cause Mr. Oney's illness, and that John Crane's products were not a significant contributing cause of his mesothelioma. John Crane's Answer also asserted that other

manufacturers' asbestos-containing products caused Mr. Oney's illness and death, not John Crane's. By the time of trial, all of the defendants except John Crane had either been voluntarily non-suited or dismissed pursuant to settlement. (TR, March 16, 2007, 37-38 at 155a-56a).

During the course of discovery and trial, Mr. Oney and his former co-worker witnesses identified the manufacturers and/or suppliers of other asbestos-containing products to which Mr. Oney was exposed, including Johns-Manville and Flexitallic. (TR, March 27, 2007, 468-70 at 126a-28a, 480-81 at 136a-38a; TR, March 28, 2007, 580 at 90a-91a, 670-73 at 96a-100a; TR, April 2, 2007, 1222-23 at 62a-65a). These two companies had not been named by Mr. Oney as defendants in this action, likely due to their judgment-proof status. Nevertheless, Johns-Manville has a trust in place that compensates claimants meeting certain requirements of exposure and diagnosis. Although Plaintiff's fact and expert witnesses implicated both Johns-Manville and Flexitallic as substantial contributing causes of Mr. Oney's disease, Plaintiff never sued or settled with either. Plaintiff's counsel acknowledged during pre-trial arguments concerning liability allocation that plaintiff simply chose not to file a claim with Johns-Manville's trust, though she was free to do so. (TR, March 16, 2007, 37 at 155a).

At trial, Plaintiff's expert Dr. Maddox testified that each and every exposure to asbestos experienced by Mr. Oney constituted a substantial contributing cause of his mesothelioma. (TR, March 29, 2007, 803-04 at 68a-70a, 808-19 at 70a-81a, 867-

69 at 82-84a). Followed logically, the thrust of Dr. Maddox's testimony was that every identified manufacturer of asbestos-containing products contributed to Mr. Oney's disease, regardless of the amount of asbestos fiber released by the product or the duration and intensity of Mr. Oney's exposure to it. Thus, according to Dr. Maddox, every asbestos-containing product to which Mr. Oney was exposed was at least partially responsible for his death.

In the face of this evidence, John Crane moved the court in advance of trial to allow the verdict to be apportioned among non-settling defendants, settling defendants, and other absent tortfeasors. (TR, March 16, 2007, 37-56 at 155a-73a). The motion was denied as to absent tortfeasors. Id. at 55. John Crane argued again at the close of trial, during the jury instruction conference, that the court should instruct the jury that they were free to apportion damages among all identified tortfeasors pursuant to a limited joint and several liability approach. (Id.; TR, April 9, 2007, 2258-64 at 53a-59a). John Crane argued that such an apportionment scheme was consistent with maritime law and the trend of this Court's decisions concerning the same. (TR, April 9, 2007, 2258-64 at 53a-59a). The trial court denied John Crane's motion, thereby leaving absent tortfeasors and even most settling defendants off the verdict form. Id. at 2264.

At that same time, Plaintiff also moved to strike John Crane's evidence as to the comparative fault of any manufacturer except Garlock. (TR, April 9, 2007, 2256-64 at 50a-59a). Plaintiff's counsel argued that because Plaintiff never sued or filed a

claim against Johns-Manville or Flexitallic, it had no place on the verdict form. Id. The trial court agreed and granted Plaintiff's motion to strike as to Johns-Manville and Flexitallic. Id. at 2258-64.

Ultimately, the jury was instructed that it could assign a percentage of liability for Mr. Oney's death only to John Crane and Garlock. (TR, April 11, 2007, 2559 at 49a). On April 10, 2007, the jury returned its $9.25 million verdict, allocating 60% of the liability to John Crane and 40% to Garlock. Id. Judgment in the amount of $5,550,835 was entered against John Crane on June 12, 2007. John Crane timely filed its Notice of Appeal to the trial court on July 9, 2007 and filed its Petition for Appeal to the Supreme Court of Virginia on September 12, 2007. The Supreme Court of Virginia denied the Petition for Appeal on December 19, 2007.

## PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

John Crane respectfully asks this Court to determine the correct liability apportionment scheme under maritime products liability law when there are several different types of potential tortfeasors who may have contributed to the plaintiff's injury. Such is the case in asbestos litigation where a multitude of asbestos-containing products, manufactured by various entities, have been identified as having contributed to a plaintiff's injury. Although this Court has addressed the method of apportioning fault among tortfeasors in cases where all potential tortfeasors are named as defendants (see McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994)(where the Court adopted a "proportionate fault approach" upon determining how a settlement with less than all defendants in an admiralty case should affect the liability of a nonsettling defendant remaining at trial), this Court has not yet determined the parameters of the McDermott analysis, specifically, how it applies to maritime cases where, as here, fewer than all potential tortfeasors are named as defendants. The need to identify the correct apportionment scheme for cases decided under maritime law is paramount, especially in light of the differing approaches used by federal and state courts. See Calhoun v. Yamaha Motor Corporation, U.S.A., 350 F.3d 316 (3d Cir. 2003); Sigler v. Grace Offshore Co., 663 So.2d 212 (La. Ct. App. 1995); Harrison v. Garber Bros., Inc., 750 F. Supp. 203 (E.D. La. 1990); Texas Civ. Practice & Remedies Code, 33(A) §§ 33.003-004 (2008);

Louisiana Civ. Code Book III, Title V, Chap. 3, Art. 2323 (2008).

Based on this Court's reasoning in both McDermott and Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979), John Crane contends that the jury should be permitted to apportion fault to all defendants remaining at the table at verdict and all defendants who have settled, regardless of whether the evidence at trial showed exposure by the plaintiff to a particular settling defendant's products. Moreover, the jury should have the option to apportion fault to judgment-proof entities for which there was affirmative evidence of exposure at trial, regardless of whether they were ever sued. Likewise, formerly bankrupt entities with trusts established to compensate injured users of their products should appear on the jury form, especially when the plaintiff makes the conscious and informed decision not to seek such compensation. Finally, any percentage of fault allocated to a judgment-proof entity should be re-apportioned according to a "limited joint and several liability" approach, to preserve the settlement expectations of all parties. A scheme such as the one proposed by John Crane herein is more faithful to the principles enunciated in McDermott than the extremely narrow one devised by the trial court and approved by the Supreme Court of Virginia in this case.

John Crane also respectfully asks this Court to determine whether its most recent maritime jurisdiction decisions, Sisson v. Ruby, 497 U.S. 358

(1990), and Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), and tests articulated therein, require that a previously consistent line of federal appellate cases, holding maritime jurisdiction to be unavailable to shipyard workers in asbestos cases, be overruled as well. Analysis of past rulings of the Courts of Appeals, and of this Court, reveals that shipyard workers claiming asbestos injury cannot sue under maritime jurisdiction under the law of the Fourth Circuit and various other Circuits. See Oman v. Johns-Manville Corp., 764 F.2d 224, 230 (4th Cir.) (en banc), cert. denied, Oman v. H.K. Porter, 474 U.S. 970, 106 S. Ct. 351 (1985). Although the Fourth Circuit's test for applying maritime jurisdiction was disapproved by this Court for being too fact-specific, the result in Oman and its brethren is valid under this Court's current test as articulated in Sisson and Grubart. Moreover, the Supreme Court of Virginia's decision conflicts with Sisson and Grubart, because its decision improperly applied the "disruptive impact" and "substantial relationship" factors of the nexus test. John Crane has already appealed this issue to this Court in the appeal styled John Crane Inc. v. Jones, U.S. Supreme Court, No. 07-792 (Petition for Writ of Certiorari filed December 13, 2007), which arose from substantially similar facts and from the same trial court as the case at bar.

## I. JOHN CRANE'S PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY DEFINITIVELY DECIDE HOW TO APPORTION DAMAGES UNDER GENERAL MARITIME LAW IN CASES WHERE FEWER THAN ALL IDENTIFIED TORTFEASORS ARE NAMED AS DEFENDANTS.

Recent holdings by Virginia trial courts and, most recently, by the Supreme Court of Virginia, have forced litigants in asbestos shipyard tort claims to consider the impact of maritime law on cases which had previously been tried exclusively under state substantive law. See John Crane Inc. v. Jones, ___ Va. ___, 650 S.E.2d 851 (2007) (holding that maritime jurisdiction was properly applied to a tort claim brought by the widow of a shipyard employee who worked on navigable waters); Oman v. Johns-Manville Corp., 764 F.2d 224, 230 (4th Cir.) (en banc), cert. denied, Oman v. H.K. Porter, 474 U.S. 970, 106 S. Ct. 351 (1985) (holding that maritime jurisdiction was inappropriate under substantially identical facts). One of the most problematic aspects of the new application of maritime law to asbestos cases has been application of the fault apportionment concept first pronounced by this Court in United States v. Reliable Transfer, 421 U.S. 397 (1975), and refined in McDermott. Although this Court clarified in McDermott that the liability of nonsettling defendants in maritime cases should be calculated with reference to the jury's allocation of proportionate responsibility, rather than by giving nonsettling defendants credit for the dollar amount of settlements entered into between a plaintiff and

other defendants, it did not have occasion to address how this "proportionate share approach" would apply in cases where fewer than all tortfeasors are named as defendants. McDermott, 511 U.S. at 217. Nor has the Supreme Court of Virginia addressed this issue. Although it was presented with an opportunity to address the apportionment issue in the factually similar case of Garlock Sealing Technologies, LLC v. Little, 270 Va. 381, 388, 620 S.E.2d 773, 777 (2005), the Supreme Court of Virginia addressed it only in dicta. Accordingly, neither the Supreme Court of Virginia nor this Court has addressed how apportionment properly functions in cases where less than all potential tortfeasors are named as defendants and there is evidence that each contributed to the plaintiff's injury.

However, this Court has provided substantial guidance on this issue. Read together, Edmonds and McDermott suggest that fault should be apportioned initially among all those identified as tortfeasors, regardless of whether they were named as parties to the action, and then a judgment-proof tortfeasor's share of the liability should be divided proportionally among all other identified tortfeasors. This method would both ensure that no defendant at trial pays more than its equitable share of a judgment and prevent punishment of those defendants who choose not to settle. See David D. Jensen, Navigating the Straits of Settlement and Insolvency: A Reconciliation of Joint and Several Liability and Proportionate Settlement under the Maritime Law, 60 Wash. & Lee L. Rev. 623 (2003) ("Note") (proposing an apportionment approach substantially similar to that set forth in this Petition). This

scheme best applies the paramount considerations discussed in McDermott.

This Court should grant certiorari to address for the first time the maritime apportionment issue that the Supreme Court of Virginia declined to decide in Little and declined to address in this case. If the Court refuses to hear this case, apportionment of liability in maritime law will remain unsettled, with each state applying its own apportionment scheme.

### A. This Petition Should Be Granted Because the Decision of the Supreme Court of Virginia Conflicts with Existing Maritime Jurisprudence on the Proper Method of Apportionment.

This case presents the Court with an opportunity to cure an injustice that is occurring under the currently undefined maritime liability apportionment scheme in which former manufacturers of encapsulated low dose exposure asbestos products are being found liable and assigned more than their proportionate share of tort liability, simply because they are financially viable. Because the correct apportionment theory is unclear, it is often the case, as it was here, that courts will refuse to allow absent or judgment-proof tortfeasors, whose products are usually present in far greater quantities, release thousands of times more asbestos fibers, and are comprised of a more potent form of asbestos, to appear on a jury verdict apportionment form. These courts reason that a jury should not be

allowed to assign liability to a party not present before them under the mistaken rationale that it is unfair to the absent party and/or the plaintiff to do so. Under this Court's maritime precedent, however, liability is regularly assigned to absent tortfeasors.

It is well-settled that the principle of joint and several liability continues to apply in a maritime setting where judgment has been entered against multiple defendants. McDermott, 511 U.S. at 220-21; Edmonds, 443 U.S. at 263. It is also established that where one defendant settles with a plaintiff before trial and the other defendants continue to trial, the claims that the plaintiff has against the non-settling defendants are reduced by the released defendant's proportionate share of responsibility for the total obligation. McDermott, 511 U.S. at 211 (finding three considerations "paramount" to allocation of liability: (1) consistency with the proportionate fault approach of Reliable Transfer, (2) the promotion of settlements, and (3) judicial economy). Indeed, this situation occurred in this case when Garlock, which settled with plaintiff prior to trial, was placed on the verdict form and allocated 40% of the fault. Nevertheless, in maritime cases where multiple manufacturers of asbestos-containing products have been identified as having contributed to a plaintiff's injury, yet only a few have been named as defendants, important allocation questions remain: (1) how should fault be apportioned among all those identified; (2) how should a judgment-proof tortfeasor's liability be apportioned among other identified tortfeasors; and (3) how should the fault of a judgment-proof

tortfeasor with a trust fund in place, from which a plaintiff may recover, be apportioned by the jury.

In light of these unanswered questions, John Crane advocated at trial the following apportionment scheme: all entities whose products may have been a substantial contributing factor to Plaintiff's injury, and all entities who settled with Plaintiff in exchange for a release of liability to Plaintiff for his injury, be placed on the jury form. Then, once fault has been apportioned, the percentage of fault allocated to judgment-proof entities should be re-apportioned among all other viable entities. The trial court ruled in favor of Plaintiff, however, and refused to allow the appearance of any absent tortfeasors on the verdict form. (TR, March 16, 2007, 51-56 at 167a-73a; TR, April 9, 2007, 2256-64 at 50a-59a). In its ruling, the trial court specifically noted that it felt obligated by the Supreme Court of Virginia's dicta in Little, 270 Va. at 387-88, 620 S.E.2d at 777 to rule as it did. (TR, March 16, 2007, 51-56 at 167a-73a). The Supreme Court of Virginia evidently felt obligated by the same when it chose not to award John Crane an appeal in the instant case.

In Little, the Supreme Court of Virginia discussed in dicta, but did not decide, the proper method of apportioning liability in asbestos cases decided under maritime law. 270 Va. at 387-88, 620 S.E.2d at 777. There, the trial court apportioned liability among Garlock and ten entities that had not been parties to the litigation, including three insolvent entities. Id. at 385, 387. The trial court then held Garlock alone responsible for the shares of

the insolvent entities, which method of apportionment Garlock appealed. Id. The Supreme Court of Virginia chose not to address Garlock's contentions of error in apportionment, ruling that "[w]e will not permit Garlock...to obtain an apportionment of liability among itself and 10 entities that were not parties to this litigation and then complain about the method of apportionment." Id. at 387-88, 620 S.E.2d at 777. In dicta, the Court expressed "serious reservations" about whether United States Supreme Court precedent would allow apportionment of liability to settling defendants, non-settling defendants and absent tortfeasors, but it did not rule on the matter. Id.

Contrary to the Supreme Court of Virginia's concerns, the idea of apportioning fault to a non-party is not novel. At least two states with high volumes of asbestos litigation have statutes providing for the allocation of fault to non-parties. See Texas Civ. Practice & Remedies Code, 33(A) §§ 33.003-004 (2008) (ordering the trier of fact to determine the percentage of responsibility held by each claimant, each defendant, each settling person, and each "responsible third party" designated by a defendant); Louisiana Civ. Code Book III, Title V, Chap. 3, Art. 2323 (2008) (providing for the distribution of percentages of fault in wrongful death actions to "all persons causing or contributing to the injury," regardless of whether the person is a nonparty, insolvent, or immune to suit). Although apportionment of fault to non-parties in Texas and Louisiana is based on statutory provisions, in the absence of a full statutory body of general maritime tort law, courts sitting in admiralty have the

freedom to articulate rules, based on state law, which ensure that liability is properly apportioned among tortfeasors. See Carnival Corp. v. Carlisle, 953 So. 2d 461, 464 (Fla. 2007) (where the court noted that "federal maritime law is an amalgamation of federal legislation, federal common law, and state maritime law); see also Greenly v. Mariner Mgmt. Group, Inc., 192 F.3d 22, 26 (1st Cir. 1999) (finding that "[a]lthough a court sitting in admiralty jurisdiction must apply federal maritime rules that directly address the issues at hand, it may – and should – resort to state law when no federal rule covers a particular situation"); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 320-21 (1955). Recent federal and state decisions also support the apportionment of fault to non-parties in appropriate circumstances.

In Calhoun v. Yamaha Motor Corp., U.S.A., 350 F.3d 316, 325 (3d Cir. 2003), a products liability case tried under maritime law, the Third Circuit affirmed the district court's submission to the jury of the possible comparative negligence of two tortfeasors, Roffe and Palmas del Mar, who had not been joined as parties to the suit. According to the plaintiffs, rules of joint and several liability should have governed, and the possible negligence of non-parties should not have been considered. Id. Ruling that error was unlikely, the Third Circuit quoted from McDermott to the effect that, "[i]n such cases [of settlement], the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement."

Id. at 325, n.11, citing McDermott, 511 U.S. at 220-21 (citations and footnotes omitted). The Court of Appeals held that although Roffe and Palmas del Mar did not settle with plaintiffs, nor was there immunity resulting from contract, the comparative negligence rule announced in McDermott still applied. Id. The court specifically noted that Roffe and Palmas del Mar had not been made parties to the suit due to the voluntary acts of the plaintiffs in dismissing them or suing them elsewhere. Id. As such, the court held the "recovery against [the two] has been limited not by outside forces, but by [their own decision]." Calhoun, 350 F.3d at 325, n. 11, quoting McDermott, 511 U.S. at 221. Under such circumstances, the court observed, that defendants at trial should only be responsible for their proportionate share of liability. Id. at 325, n. 11.

The Calhoun court discussed another maritime decision that reached a similar conclusion. In Sigler v. Grace Offshore Co., 663 So. 2d 212, 213 (La. Ct. App. 1995), the plaintiff sued his employer, the employer's insurer, and a crew boat operator for injuries he allegedly sustained while offloading equipment from a drilling vessel. The plaintiff later voluntarily dismissed his claims against his employer and its insurer. Id. at 214. The court explained that the crew boat operator could be held responsible only for his proportionate share:

> Although there has not been a settlement *per se* in this case, the plaintiff voluntarily dismissed his claims against [his employer and its insurer] with prejudice. For purposes

> of the proportionate allocation of fault, we discern no distinction between a settlement and a voluntary dismissal. Both are agreements entered into by the plaintiff which serve to limit his recovery as opposed to the outside forces such as insolvency or statutory immunity discussed in McDermott.

Id. at 215 (emphasis added). The same reasoning can be applied with equal force here where Plaintiff voluntarily dismissed several defendants, chose not to sue Johns-Manville, and further chose not to pursue her rights to share in its available trust fund proceeds. In this sense, the relation between Plaintiff and Johns-Manville can be equated to a settlement, voluntary dismissal, or any other action taken by a plaintiff which limits her recovery.

Further, in Harrison v. Garber Bros., Inc., 750 F. Supp. 203, 204-05 (E.D. La. 1990), the plaintiff contended that there should be no apportionment made to a settling non-party joint tortfeasor because she had not sued him. Instead, she argued, citing Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979), that the general rule of joint and several liability for maritime claims controls, so that, if found at all at fault, Garber Bros. would have been liable to her for the non-party's fault as well. Harrison, 750 F. Supp. at 204-05. The district court disagreed, finding that Leger did not concern settling tortfeasors who had not been named in the plaintiff's lawsuit. Id. at 205. The Leger court held that non-settling joint tortfeasors may attempt to prove that the settling alleged joint tortfeasor was at

fault and the liability for the damage proved will be allocated among the tortfeasors and the plaintiff based on their comparative fault; the plaintiff's recovery against the non-settling joint tortfeasors being reduced by his own comparative fault as well as that of the settling alleged joint tortfeasor. Leger, 592 F.2d at 1249. The district court noted in Harrison that this rule applies equally where a settling tortfeasor is never made a party, but before settling could have been sued. Harrison, 750 F. Supp. at 205. The court determined this rule to be in full accord with this Court's decision in Reliable Transfer. See also, Bordelon v. Consolidated Georex Geophysics, 628 F. Supp. 810, 811 (W.D. La. 1986) ("How else can comparative fault be applied in cases involving multiple joint tort-feasors, without determining the fault of each alleged joint tort-feasor vis-a-vis the other alleged joint tort-feasors as well as the plaintiff.")

As demonstrated by the cases above, application of maritime law's apportionment scheme is unsettled. Although Virginia's highest court holds that allocating fault to non-parties is not permitted, other state and federal courts routinely permit juries to apportion fault to non-parties to ensure that defendants are held responsible only for their proportionate share of responsibility to the plaintiff. This Court now has the opportunity to apply the "proportionate share approach" of Reliable Transfer and McDermott to the knotty apportionment issues raised in asbestos liability cases where a second generation of low dose exposure defendants is being held accountable for the asbestos exposures

created by far more culpable, now insolvent, entities. This Court should, therefore, grant John Crane's Petition.

### B. A Limited Joint and Several Liability Approach to Apportioning Liability of an Insolvent Defendant Among All Other Identified Tortfeasors Is Consistent with Edmonds and McDermott.

At trial, John Crane proposed an apportionment scheme that would permit allocation of liability to four classes of tortfeasors: (a) defendants "at the table" at verdict, e.g., John Crane; (b) defendants who were sued by the plaintiff but settled before the verdict, e.g., Garlock; (c) tortfeasors who are judgment-proof but have established a trust for compensation of injured asbestos workers and their families, e.g., Johns-Manville; and (d) all persons or corporations who contributed to the plaintiff's injury but were not sued by the plaintiff, e.g., Flexitallic. (TR, March 16, 42-49 at 159a-66a; April 9, 2007, 2256-64 at 50a-59a). Under this scheme, a fact finder first allocates fault to all identified tortfeasors – non-settling defendants, settling defendants, tortfeasors not named as defendants, and tortfeasors that are insolvent – and then reallocates the fault assessed to a judgment-proof tortfeasor among the other identified tortfeasors, including settling defendants and those that were never made parties. See Note at 644, App. 223a-24a. All of the defendants left at the table at verdict would be responsible only for the

percentage shares allocated to them, plus a proportionate share of the judgment-proof tortfeasor's liability. John Crane argued that such an approach comes closest to ensuring that no defendant at trial pays more than its proportionate share of the judgment, and replicates the allocation that would result for non-settling defendants (after contribution) had no settlement occurred. (See John Crane's Mot. to 1) Apportion Fault of Judgment-Proof Defendant Proportionally Among Both Settling and Nonsettling Defendants, and 2) Permit the Jury to Apportion Fault to Employer Shipyard, and Memorandum in Support, 14 at 189a-90a). The trial court rejected this proposal, ignoring the evidence that proved Johns-Manville and Flexitallic's unquestionable and substantial contribution to the cause of Mr. Oney's disease. (TR, March 27, 2007, 468-70 at 126a-28a, 480-81 at 136a-38a; TR, March 28, 2007, 580 at 90a-91a, 670-73 at 96a-100a; TR, March 29, 2007, 803-04 at 68a-70a, 808-19 at 70a-81a, 867-69 at 82a-84a; TR, April 2, 2007, 1222-23 at 62a-65a; TR, April 9, 2007, 2256-64 at 50a-59a).

John Crane submits that this Court's decisions in Edmonds and McDermott support John Crane's proposed approach to apportionment. See Note, at 643. In McDermott, the plaintiff sued a crane manufacturer (AmClyde), the manufacturer of a crane hook (River Don), and three manufacturers of steel slings for damage to a crane and an offshore platform deck. McDermott, 511 U.S. at 204-05. Before trial, McDermott settled with the three sling defendants for $1 million dollars. Id. at 204. The

other two defendants did not settle, and the jury eventually assessed the plaintiff's damages at $2.1 million, apportioning liability at 32% to AmClyde, 38% to River Don, and 30% jointly to McDermott and the sling defendants. Id. at 206. Faced with the task of determining how the $1 million settlement with the sling defendants should affect the liability of the non-settling defendants, the Court unanimously adopted a "proportionate share" approach. Id. at 217. Under this scheme, any amount paid in settlement extinguishes any claim that the injured party has against the released defendant, and further diminishes the claim that the injured party has against the non-settling defendants by the released defendant's proportionate share of responsibility for the total obligation. Id. at 209, 217. The Court, therefore, reduced the plaintiff's recovery from the non-settling defendant by the settling defendants' proportionate percentage share of responsibility for the total obligation, rather than dollar-for-dollar on the settlement amount. McDermott, 511 U.S. at 210, 218. River Don was left responsible only for its precise share of the damages – 38% of $2.1 million, or $798,000. Id.

This Court recognized the appeal of a limited joint and several liability approach when it noted that the principles of joint and several liability articulated in Edmonds would not elevate River Don's liability to include that of AmClyde – a judgment-proof defendant. Id. at 211, n. 10. The Court stated that while "it might be thought that, since AmClyde is immune from damages, River

Don's liability should be $1.47 million (McDermott's $2.1 million loss minus 30% of $2.1 million, the share of liability attributed to the settling defendants and McDermott)," the better approach was to view the contractual provision limiting AmClyde's liability as a "quasi settlement." Id. "Viewed as such, the proportionate credit in this case properly takes into account both the 30% of liability apportioned to the settling defendants (and McDermott) and the 32% allocated to AmClyde. This leaves River Don with $798,000 or 38% of the damages." Id. The Court was willing to adopt an approach similar to limited joint and several liability that would have held River Don liable only for its precise share of damages and not that of AmClyde.

A limited joint and several liability scheme is also consistent with the Court's statement in McDermott that the principle of joint and several liability "can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from the other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency." 511 U.S. at 220-21. For example, consider a case where there are three potential tortfeasors: (1) one which was not sued by plaintiff because it is insolvent, (2) one which was sued by plaintiff and settled, and (3) one which goes to trial and suffers an adverse judgment. The third party, rather than the plaintiff, would be forced to bear the judgment-proof defendant's share of responsibility for the total obligation in the amount that it would have paid had the second party not

settled.[3] Thus, the only remaining viable defendant would actually be paying more than its originally apportioned share of liability, but it would not be required to bear the entire portion of the judgment-proof defendant's responsibility alone. Conversely, where recovery from absent defendants was limited by the plaintiff's voluntary acts, the scheme would force the plaintiff to bear the consequences of his or her strategic decisions. This approach avoids "disadvantaging the party that spurns settlement offers," which the McDermott court considered to be an unnecessary incentive to promote settlement. See McDermott, 511 U.S. at 215.

Plaintiff argued first in the trial court (TR, March 16, 2007, 37 at 155a; TR, April 9, 2007, 2258-64 at 53a-59a), and again in opposition to John Crane's Petition to the Supreme Court of Virginia, that even if this Court's holding in McDermott did apply as John Crane argues, because Johns-Manville

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[3] In this case, the second and third parties would each be re-apportioned a percentage of the allocation to the judgment-proof first party. For example, assuming an award of $1,000,000, if the first party were apportioned 50% of the fault, the second were apportioned 30%, and the third received 20%, the re-apportionment would be as follows: the second party would ultimately be apportioned $550,000 (its original 30% share + one half of the judgment-proof party's 50% share, or 25% = 55%), and the third party would be apportioned $450,000 (its original 20% share + one half of the judgment-proof party's 50% share, or 25% = 45%). Since the plaintiff has already agreed with the amount that the second party should pay in exchange for a release from liability, the second party is liable for no more than that amount, and the third party is liable for 45%, an amount that closer resembles its ultimate share of fault while still taking in to account this Court's concern in McDermott that a plaintiff not be penalized for a judgment-proof defendant's inability to pay.

never settled with Plaintiff or was made a party to Plaintiff's suit and later dismissed, there was no basis for allowing a jury to apportion liability to it. However, Plaintiff plainly misreads McDermott and misinterprets its scope. As noted above, in McDermott, it was only the "sling defendants," and not AmClyde, that settled with McDermott prior to trial. AmClyde was instead immune from liability under a contract entered into voluntarily with McDermott. Nonetheless, this Court still reduced the verdict by AmClyde's proportionate share of liability. The critical distinction to be observed in applying McDermott's proportionate share rules, therefore, is not, as Plaintiff has previously argued, whether there was a settlement with the absent tortfeasor and the plaintiff. The critical factor is whether the absent defendant is unavailable due to some voluntary action of the plaintiff (such as a contract making a potentially liable party immune from liability or, as in the case at bar, a strategic decision not to sue a party that has limited resources with which to pay) as opposed to the defendant being unavailable due to forces outside the plaintiff's control.

Lastly, a limited joint and several liability method is consistent with all three "paramount" principles announced in McDermott – (1) the proportionate fault approach of Reliable Transfer, (2) the promotion of settlements without unnecessary pressure to do so, and (3) judicial economy. First, limited joint and several liability is consistent with the proportionate fault approach in that it results in each non-settling defendant paying only the share of damages it would have paid had all defendants

proceeded to trial. Second, a limited joint and several liability approach preserves settlement incentives, but does not provide additional incentives at the expense of other, non-settling defendants. See Note, at 650, App. 230a-32a. As with proportionate share apportionment, a settling defendant will still appear on the jury verdict form so that the jury can apportion fault to it; however, the plaintiff bears the risk that the settlement monies received from the settling defendant will not be enough to account for its proportion of fault after allocation and, if necessary, the reallocation of a judgment-proof entity's share. Id. Third, the approach promotes judicial economy, because reallocating a judgment-proof tortfeasor's share of damages among the other defendants takes little or no additional time at trial. It is simply a quick mathematical exercise to divide the judgment-proof tortfeasor's liability between the viable defendants proportionately to their degree of fault. Further, the "good faith" settlement hearings that the McDermott Court disfavored would be unnecessary because the non-settling defendants would have no interest in how much or how little a defendant settles for. Id. at 650-651.

Because John Crane's proposed approach to apportionment best serves the three principles announced in McDermott, this Court should adopt a limited joint and several liability approach to allow a judgment-proof tortfeasor's share of responsibility for the total obligation to be borne by all other identified tortfeasors - settling and non-settling, those named and unnamed - proportionately. The trial court erred in instructing the jury on its ability to allocate damages only to John Crane and Garlock

and in submitting a verdict form containing only those entities. As a result, John Crane will pay more than its fair share of the $9.25 million judgment. A new trial is warranted.

### C. Public Policy Considerations Demand the Inclusion of All Settling Parties and All Contributing Non-Parties on the Jury Form.

The apportionment scheme approved by the trial court and by the Supreme Court of Virginia effectively allows plaintiffs to manipulate maritime's joint and several liability rule to reap all the benefits of settlement without risking the apportionment of damages to settling entities. For example, Plaintiff's counsel in this case consistently takes the position that John Crane has no reason and no right to know with whom Plaintiff has settled until just prior to the jury's verdict. However, during trial, plaintiffs typically argue that John Crane has the burden of proof as to which other entities contributed to the plaintiff's injury, refusing to consent to inclusion of those parties on the jury form unless they were specifically named by the plaintiff's fact witnesses. Thus, under Virginia's current scheme, John Crane has the unenviable task of proving the plaintiff's exposure to products when it may not benefit from apportionment to any of those entities as they may not have settled with the plaintiff but were rather non-suited.[4]

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[4] Compare this approach to Virginia law where defendants receiving an adverse judgment are automatically entitled to a dollar for dollar set off for monies received by the plaintiff in settlement. Under Virginia law, a defendant is not required to put on any evidence, or even mention a settling defendant's name, to receive this credit.

An apportionment rule that protects the expectations of the parties at trial by allowing for apportionment to all entities that contributed to the plaintiff's injury, whether settled or not, whether originally named a party or not, would be more fair. Asbestos trials are highly technical proceedings which require testimony from as many as a dozen expert witnesses. To require defendants like John Crane to guess the identify of parties about which it must prove exposure during its case in chief (so that it might benefit from Virginia's apportionment scheme in the event the jury returned an adverse judgment for John Crane) is highly prejudicial and inevitably leads to a waste of judicial resources spent entertaining redundant testimony. Moreover, it forces defendants like John Crane to devote much of their limited time before the jury demonstrating the liability of other parties, rather than presenting a full defense as to why they are not themselves liable to the plaintiff.

The apportionment scheme proposed by John Crane further promotes judicial economy in that it makes contribution lawsuits unnecessary. McDermott, 511 U.S. at 209. In McDermott, the Court recognized the appeal of its proportionate share approach when it noted that under this approach, "no suits for contribution from the settling defendants are permitted, nor are they necessary, because the nonsettling defendants pay no more than their share of the judgment." 511 U.S. at 209. In asbestos products liability cases, avoiding contribution suits is of utmost importance. In such cases, courts face the possibility of every defendant

that receives an adverse judgment in a case filing a contribution suit against every other possible tortfeasor. For each asbestos case, therefore, courts may be faced with an additional thirty suits. Permitting the jury to apportion damages at trial among all potential tortfeasors would dramatically reduce the potential for a barrage of contribution suits arising from each case that goes to trial. In her Brief in Opposition to John Crane's Petition for Appeal to the Virginia Supreme Court, Plaintiff notes that to ensure that each potentially responsible entity was brought before the court, John Crane could have cross-claimed against co-defendants or filed third-party claims for contribution or indemnity against additional entities. Plaintiff fails to realize the importance of judicial economy. Asbestos trials often take weeks to try. Forcing defendants and the courts to endure weeks of additional litigation is a waste of judicial resources.

Giving the jury the ability to apportion fault to all potentially responsible entities reflects an asbestos plaintiff's true variety of exposure. If accepted, John Crane's apportionment theory would place maritime products liability defendants on even ground, and give the jury an equal opportunity to evaluate all potential exposures experienced by a plaintiff, instead of merely those hand-picked by the plaintiff's counsel. This approach comports with fundamental fairness and judicial economy. The Court should grant John Crane's Petition.

## II. CERTIORARI SHOULD BE GRANTED BECAUSE THE SUPREME COURT OF VIRGINIA'S DECISION TO AFFIRM THE APPLICATION OF MARITIME LAW TO PLAINTIFF'S WRONGFUL DEATH CLAIM CONFLICTS WITH THIS COURT'S ESTABLISHED PRECEDENT.

On February 26, 2007, John Crane moved the trial court to apply Virginia law, rather than maritime law, to decide the issues in this case. At the final pre-trial conference held March 16, 2007, following Little, 270 Va. at 387-88, 620 S.E.2d at 777, and Judge Tench's ruling the previous year in Jones v. John Crane, the trial court decided to apply maritime law. (TR, March 16, 2007, 51-52 at 167a-69a, 58). As a result, the jury was not instructed on the Virginia standard of case – "knew or had reason to know" asbestos was dangerous – but was instead forced to apply the stricter maritime standard of "knew or should have known."[5]

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[5] The differences between maritime and Virginia tort law number far more than the one listed above. To cite a few more differences, maritime law follows a comparative fault approach to liability with allocation of fault among joint wrongdoers (McDermott, Inc., 511 U.S. at 207), while contributory negligence by the plaintiff is a complete bar to recovery in Virginia (Estate of Moses v. Southwestern Va. Transit Mngmnt. Co., 273 Va. 672, 678 S.E.2d 156, 159-60 (2007). Plaintiffs in admiralty courts can recover under a strict liability standard (East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 865 (1986)), while plaintiffs in Virginia courts cannot. Sensenbrenner v. Rust, Orling & Neale, Architects, 236 Va. 419, 424 n.4, 374 S.E.2d 55, 57 (1988). Virginia observes a statutory cap of $350,000 on punitive damages. § 8.01-38.1, Code of Virginia, 1950, as amended. General maritime law, if it provides for punitive damages, has no cap.

At the time of this filing, John Crane is seeking an appeal of this identical issue to this Court under a substantially similar set of facts in John Crane v. Jones, No. 07-792.[6] John Crane believes that the Supreme Court of Virginia's denial of John Crane's Petition for Appeal in the instant case was heavily influenced by its previous decision in Jones, 650 S.E.2d 851, to apply general maritime law to cases brought by shipyard workers alleging that exposure to asbestos-containing products proximately caused their injuries. Because both the facts and arguments raised by John Crane in Jones and the present case are substantially similar for purposes of determining whether application of general maritime law is appropriate, John Crane incorporates herein by reference its arguments made in the Jones appeal. Should this Court decide in John Crane's favor on this issue in Jones, John Crane requests that the Court also grant this appeal and reverse the trial court's ruling consistently with the Court's findings in Jones.

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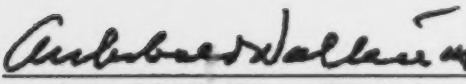
[6] At the time of this filing, Jones is scheduled to be distributed for Conference on February 15, 2008.

## CONCLUSION

For the foregoing reasons, John Crane Inc. respectfully requests that this Court grant its Petition for Writ of Certiorari and, upon review, vacate the judgment of the trial court entered on June 12, 2007, reverse the Supreme Court of Virginia's ruling dated December 19, 2007, and order that a new trial be conducted under the law of the Commonwealth of Virginia, or, if maritime law was appropriately applied in this case, to order a new trial pursuant to the apportionment scheme described herein.

Respectfully submitted,
**JOHN CRANE INC.,**
By Counsel



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# APPENDIX

[ENTERED: DECEMBER 19, 2007]

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 19th day of December, 2007.*

John Crane, Inc., Appellant,

against Record No. 071861
Circuit Court No. 00301-TF

Sandra Kay Oney, Executor, etc., Appellee.

From the Circuit Court of the City of Newport News

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, Court refuses the petition for appeal.

A copy,

Teste:
Patricia L. Harrington, Clerk

By: /s/_____
Deputy Clerk

**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**SANDRA KAY ONEY, Executor of the Estate of SHARON VAUGHN ONEY, Deceased,**

**Plaintiff,**

**v.** **At Law No. 00301-TF**

**JOHN CRANE, INC.,**

**Defendant.**

**FINAL ORDER**

THIS DAY came the plaintiff, Sandra Kay Oney, Executor of the Estate of Sharon Vaughn Oney, deceased, by counsel, and the Defendant, John Crane, Inc., by counsel, on the jury's verdict and John Crane's Post trial Motions To Set Aside The Jury's Verdict;

Whereas on April 11, 2007, the jury returned a verdict in favor of the plaintiff and awarded the plaintiff $9,000,000 in compensatory damages and $251,392.06 in medical and funeral expenses, for a total jury award of $9,251,392.06, and awarded legal interest thereon beginning July 11, 2007 until paid; and

Whereas the jury apportioned 60% of the total jury award to defendant John Crane, Inc., and 40% of the total award to Garlock Sealing Technologies, LLC, and

Whereas on April 23, 2007 the defendant filed written motions to set aside the verdict on various grounds; and

Whereas each of the parties have filed written briefs relating to John Crane's Post Trial Motions to Set Aside the Jury's Verdict, and both parties have fully argued said motions *ore tenus,* and the motions are ripe for decision. It is hereby

ORDERED that John Crane's motion to set aside the verdict be, and hereby is, denied as to each of the grounds asserted by John Crane for the reasons stated on the record of proceedings of May 8, 2007, for the reasons set forth in the Plaintiff's Brief in Opposition to John Crane's Post Trial Motions, and for the reasons set forth in this Court's Memorandum Opinion dated May 25, 2007, attached as Exhibit A and incorporated by reference hereto; and it is further

ORDERED that judgment shall be, and it hereby is, entered against the defendant, John Crane Inc., in the amount of $5,550,835 with legal interest thereon beginning July 11, 2007 until paid and the costs, such amount being the 60% share of the total jury award assigned by the jury to John Crane, Inc., with exceptions taken by the defendant to all such rulings; and it is

ORDERED that, upon agreement of the parties, John Crane Inc. shall file an appeal bond in the amount of $6,000,000 in the event it chooses to file an appeal in this matter.

The Court further Orders that the Clerk provide a certified copy of this Order to counsel for the plaintiff and defendant.

And the record made by the Court Reporter herein of the said proceedings is filed as part of the record in this case.

Entered this 12th day of June, 2007.

/s/
Timothy S. Fisher, Judge

SEEN:

/s/
Robert R. Hatten, Esq.
*Counsel for Plaintiff*

SEEN AND OBJECTED TO for all reasons stated in the record and in the motions and briefs previously filed herein:

/s/
Archibald Wallace, III, Esq.
*Counsel for Defendant John Crane Inc.*

[ENTERED: MAY 25, 2007]

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS THIS 25TH DAY OF MAY, 2007

The Honorable Timothy S. Fisher, Judge

SANDRA KAY ONEY, EXECUTOR OF THE ESTATE OF SHARON VAUGHN ONEY,

v. Case No. 00301-TF

JOHN CRANE, INC., ET AL,

Defendant.

MEMORANDUM OPINION

The following constitutes the court's rulings on the post-trial motions filed by defendant, John Crane, Incorporated, received pursuant to the court's order and as further supplemented at the hearing on May 8, 2007.

B-I: Defendant John Crane's post-trial motion to set aside the verdict and to award a new trial on the grounds that it is excessive as a matter of law is denied.

B-II: Defendant John Crane's post-trial motion to set aside the jury verdict for reasons the jury instructions were incomplete or inaccurate in whole or in part is denied.

B-II Supplement: The supplement to John Crane's post-trial motion to set aside the jury verdict specifically referred to what was proffered as plaintiffs instruction number 8. is denied.

The court ruled on a version of that instruction to give to the jury and apparently the version that was then prepared by the parties and provided to the court had an inadvertent change in wording which was not intentionally changed by the plaintiff and apparently not noticed by the defendant at the time of the reading of the instructions.

For the purposes of the response to this motion and for the record, it should be noted that both plaintiff and defendant were represented by extremely competent, experienced and organized attorneys.

The plaintiff and defendant's counsel were each given the use of a witness room for the entire duration of the trial which were right outside of the courtroom and next to each other.

Both sides placed computer equipment and files in those witness rooms and used the witness rooms daily.

The instructions following the court's rulings were prepared by plaintiffs and defendant's counsel together, in those witness rooms, and then provided to the court.

The court was unaware that plaintiff and defendant, or defendant, had not kept a separate

copy of the instructions finally prepared by the plaintiff following the court's rulings to read to the jury. The court was even corrected by defendant's counsel as to the numbering on one instruction when defendant's counsel had noticed the court had numbered two instructions with the same number.

That correction was made at the time of the instructions being provided to the jury.

This objection relates to an instruction which even if it was an error is not a material error, and was not done intentionally by the plaintiff and was not contemporaneously objected to by the defendant. Accordingly, the supplement of John Crane's post-trial motion B-II to set aside the jury's verdict is denied.

B-III: Defendant John Crane's post-trial motion to set aside the verdict on the grounds that the testimonies of Paul Stewart and James Delaney were improperly excluded is denied.

The court would further state as previously announced and repeated in the hearing on May 8th that the disclosure of the testimony of the witnesses Paul Stewart and James Delaney were filed in accordance with the standing orders applicable to asbestos cases and Rule 4:1 of the Rules of the Supreme Court of Virginia.

Regardless, of the adequacy or inadequacy of the disclosures, the subsequently determined substance of the proffered testimony of both witnesses did not support an argument for the

admissibility of the testimony of either Mr. Delaney or Mr. Stewart.

B-IV: Defendant John Crane's post-trial motion to set aside the verdict on the grounds that the court improperly disallowed Dr. Bruce Case to testify at trial in any form is denied.

The court did not disallow the testimony of Dr. Bruce Case. The court was advised that Dr. Bruce Case would not be available during the time of the trial anticipated for the defendant's case in chief. Apparently, the defendant had a problem with scheduling between itself and it's expert witness, Dr. Case, and Dr. Case advised the defendant he would only be available to testify during the "first week of trial, as he would be out of both the country and the continent during the remaining period of trial."

There was no representation by the defendant that Dr. Case's absence from the trial was based on any form of emergency or unanticipated event. It was represented to the court this was a scheduling problem in that the defendant had advised Dr. Case of the beginning of the trial and he had some other event scheduled for the following week.

The plaintiff objected to taking Dr. Case's testimony during its case in chief and receiving no valid reason for forcing the plaintiff to interrupt its presentation of the evidence to accept the defendant's expert witness during the plaintiffs case in chief, the court denied the motion.

The defendant then asked for permission to take Dr. Case's de bene esse deposition sometime during the first week of the trial or on the first weekend, which again was during the period of time the plaintiff would be presenting its evidence. Any deadline had passed for the taking of depositions at that time and again being presented with no valid reason for forcing the plaintiff to participate in a de bene esse deposition sometime in the evening on a day during the first week of the trial during its presentation of evidence or during the first weekend, the court denied that request.

The defendant then asked for leave of court to designate portions of the transcript of Dr. Case's deposition which again any deadline had passed for the designation of portions of the transcript of the deposition and the defendant objected and again, being presented with no valid reason for extending that deadline for this particular expert witness, the court denied the request.

The defendant was perfectly free to call Dr. Case as a witness during its case in chief (assuming no further objections by the plaintiff concerning the substance of Dr. Case's testimony); however, the defendant did not call Dr. Case during the presentation of its case in chief because their paid expert witness had a scheduling conflict which the plaintiff objected to being forced to accommodate and the court did not see a valid reason to accommodate defendant's expert witness.

Had there been any representation of an emergency or unanticipated event which Dr. Case

was experiencing such as a family illness or some other event; certainly the court may have acted differently in this matter and, frankly, the plaintiff may have acted differently and not interposed an objection. However, this appeared to be simply a well compensated expert witness for the defendant who was simply choosing to do something other than attend a trial which presumably he had contracted with the defendant to be paid to attend.

The court did not exclude Dr. Case's testimony. Dr. Case apparently chose not to attend the trial. That would seem to be a problem between the defendant and its witness.

B-V: Defendant John Crane's post-trial motion to set aside the verdict on the grounds that (1) the verdict form was incomplete as submitted to the jury and (2) was incompletely submitted by the jury is denied.

B-VI: Defendant John Crane's post-trial motion to set aside the verdict on the grounds that John Crane was improperly required to identify their products that contributed to Mr. Oney's injuries by the manufacturer's name rather than by generic product type is denied.

B-VII: Defendant John Crane's post-trial motion to set aside the verdict on the grounds that the court erred in applying general maritime law rather than Virginia law is denied.

B-VIII: Defendant John Crane's post-trial motion to set aside the verdict on the grounds that

the claim for punitive damages was improperly submitted to the jury is denied.

B-IX: Defendant John Crane's post-trial motion to set aside the verdict on the grounds that its motion to stay the proceedings was improperly denied is denied.

B-X: Defendant John Crane's post-trial motion to set aside the verdict on the grounds that the testimony of James Thornton was improperly limited is denied.

The defendant stated in its motion, "at no time did John Crane intend to elicit testimony from Mr. Thornton concerning the knowledge an/or negligence of the Newport News Shipyard." As the court stated during the trial, the parties had agreed to the limitation of Mr. Thornton's testimony and the court was enforcing that agreement and the law of the case.

B-XI: Defendant John Crane's post-trial motion to set aside the verdict on the grounds that the court improperly relied on the rulings of judges in past cases without further considering the evidence and law presented is denied.

There is a doctrine that rules and principles of law on which a court rested a previous decision are authoritative in all future cases in which the facts are substantially the same. That doctrine, as we are aware, is known as *stare decisis* a latin phrase which literally means to "stand on the decisions." It expresses the common law doctrine that court

decisions should be guided by precedent. It is a doctrine under which courts adhere to precedent on questions of law in order to insure certainty, consistency, and stability in the administration of justice with departure from precedent permitted for compelling reasons (as to prevent the perpetuation of injustice.)

The court did specifically advise the defendant in response to defendant's repeated requests that the court hold essentially "Daubert" pre-trial hearings regarding the admissibility of the testimony of plaintiff s proffered experts, that "Daubert" did not apply to Virginia procedure. This court saw no reason to conduct such pre-trial evidentiary hearings on testimony of witnesses who have not only been admitted as experts in other trials in this circuit and in this state; but also in other trials across the country.

That opinion of the court applied to both plaintiffs and defendant's experts.

As the court advised both sides, during research on the pre-trial motions the court had read several decisions from other states, specifically California, Ohio and Pennsylvania and Georgia, in which most of the defendant's proffered experts had all testified as had one or two of plaintiffs experts.

The court saw no reason to hold pre-trial hearings on the testimony of those experts to determine the admissibility of their testimony when they had been accepted as experts in numerous courts in Virginia and across the country.

The defendant would now seem to argue that because other judges in other courts had reached the same conclusion meant that this court should not reach that conclusion simply contravenes the doctrine *of stare decisis.*

Defendant appears to be asking the court to follow the observation of Ralph Waldo Emerson wherein he noted, "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." There did not appear to be any "foolish consistencies' in the prior decisions of the courts on which this court relied and I don't think there were any "little minds" involved in those decisions either.

It would perhaps be advisable for the defendant to consider the decision of the Virginia Supreme Court on January 12, 2007, in *Ford Motor Company, et al v. Benitez,* 273 Va. 242 (2007) in light of the observation of Albert Einstein who defined insanity as "doing the same thing over and over again and expecting different results." This particularly comes to mind regarding a motion filed citing the government contractor defense wherein the court noted in more than one written opinion denying such a motion in failure to warn cases by referring to the "thousands" of decisions preceding this concluding that the government contractor defense does not apply in a failure to warn case; yet it appeared to have been filed in this case.

The defendant's motion is denied.

B-XII: Defendant John Crane's post-trial motion affirming all objections and arguments raised before and after and during trial posed an interesting question to the court in that John Crane was asking the court to affirm their preservation of the record and further affirm that they had not waived or with-drawn any objection.

It does not appear to be one which would require a ruling of the court as either John Crane has met those requirements or it has not, so the motion is denied.

I believe this addresses all post-trial motions. If any were missed, advise me immediately.

I would ask that the counsel for the plaintiff prepare an appropriate order incorporating the provisions of this opinion, forwarding to the defendant for endorsement and further forwarding to the court a judgment order. I believe the parties have agreed to a six million dollar ($6,000,000.00) appeal bond.

/s/
Timothy S. Fisher, Judge

**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**SANDRA KAY ONEY, As Executor of the Estate of SHARON VAUGHN ONEY, Deceased**
**Plaintiff,**

**v.** **Civil Action No. 00301TF**

**JOHN CRANE, INC., et al.,**
**Defendants.**

**ORDER**

The parties to this action appeared by counsel for a pretrial conference on March 16, March 23, and March 26, 2007, and various motions previously briefed were argued *ore tenus*.

**UPON CONSIDERATION** of the briefs and the arguments of counsel, it is HEREBY ORDERED that:

1. John Crane's Renewed Motion to State the Proceedings is DENIED;

2. Plaintiff's Motion to Apply Joint and Several Liability and Prohibit Allocation of Comparative fault to Non-Party Entities is GRANTED;

3. Plaintiff's Motion to Prohibit Evidence Relating to Negligence of Non-Party and/or Bankrupt Companies is GRANTED;

4. John Crane's Motion to Apply Virginia law is DENIED;

5. John Crane's Motions to Apportion Fault of Judgment Proof-Defendant and to Permit the Jury to Apportion Fault to Employer Shipyard are DENIED;

6. Plaintiff's Motion to Apply a "Should Have Known" Standard of Care is GRANTED;

7. Plaintiff's Motion to Prohibit Defendant from Presenting Evidence to "Pure" Chrysotile Exposure is DENIED; however, Defendant must provide a factual predicate before presenting any such evidence;

8. Plaintiff's Motions to Prohibit John Crane's attorneys or witnesses from showing asbestos block or pipecovering insulation demonstrative samples to the jury without first establishing a factual predicate of type and use, and Motion to prohibit John Crane's attorneys or witnesses from removing asbestos packing products from their airtight containers are GRANTED pursuant to the agreement of the parties;

9. Plaintiff's Motion to Limit Testimony of Industrial Hygiene and Medical Experts, to Prohibit "Dose Reconstruction" Testimony, and to Prohibit Dose or Risk Extrapolation from Hypothetical Doses is GRANTED and this standard shall apply to both Plaintiff's and Defendant's experts. John Crane's Motion to Prohibit Dose or Accident Reconstruction by Plaintiff's Experts is DENIED;

10. Plaintiff's Motion to Prohibit Defendant from Claiming its Products are Exempt from OSHA Warning Requirements is DENIED; however, John Crane shall not mention the OSHA labeling exemption in opening statements and John Crane shall establish an adequate factual foundation that it was exempt from OSHA's labeling requirements before counsel may argue, allege, or present evidence of such a claim to the jury.

11. John Crane's Motion to Exclude Evidence that Related to Knowledge or State of the Art that Post Dates John Crane's Last Date of Manufacture is GRANTED pursuant to the agreement of the parties. The parties agree that post-exposure evidence in the scientific community may be offered, subject to the proper foundation, for purposes of causation, but not for state of the art;

12. Plaintiff's Motion to Strike Defendant's Government Contractor Defense is GRANTED;

13. Plaintiff's Motion to Strike Sophisticated User/Equal Knowledge Defense is GRANTED;

14. Plaintiff's Motion to Strike Defense of Intervening Negligence is GRANTED;

15. Plaintiff's Motion regarding Smoking is GRANTED;

16. Plaintiff's Motion to Prohibit Reference to Lack of Autopsy is GRANTED;

17. Plaintiff's Motion in *Limine* Prohibiting Direct or Indirect Use of Depositions of any Witness who Testified where Plaintiff was not a party or present at the time of the deposition is GRANTED pursuant to the agreement of the parties;

18. John Crane's Motion to Preclude Punitive Damages is DENIED; however, the Plaintiff shall not reference punitive damages in opening statements and Plaintiff must prove a factual basis for punitive damages;

19. John Crane's Motion to Prohibit and/or Limit Motions in *Limine* at Trial is DENIED; however, Motions in *Limine* presented at trial must comply with the Newport News Circuit Court's Local Rules, subject to the Court's discretion regarding certain incidences of trial, which may require additional motions and/or briefing;

20. John Crane's Motion to Prohibit Experts from Expressing any Opinion that Constitutes a Conclusion of Law or Goes to the Ultimate Issue of the Case is GRANTED in part pursuant to the parties' agreement. The Plaintiff agrees he will not ask his experts whether John Crane was negligent or grossly negligent; the Plaintiff, however, may solicit expert testimony relating to the standard of care and whether John Crane deviated from that standard of care;

21. John Crane's Motion in *Limine* to Exlude Exhibits Showing Knowledge of Associations of which John Crane was not a Member is DENIED. The parties agree to read a stipulation to the jury

that John Crane was not a member of such associations, and Plaintiff agrees that John Crane may file late counterdesignations to the depositions of the Associations' custodians of records. If an adequate basis of authenticity is established to the Court through the depositions of the custodians of records, the documents from these associations will be admitted or denied on the basis of relevance as established at trial;

22. John Crane's Motion to Exclude Testimony Regarding any Asbestos-Related Disease Other than Mesothelioma is DENIED;

23. Plaintiff's Motions to Strike the Testimony of Paul Steward and James Delaney are GRANTED for the reasons stated on the transcript of the hearing on March 26, 2007;

24. Plaintiff's Motion in *Limine* re PowerPoints & Demonstrative Aides is GRANTED pursuant to agreement of the parties;

25. Plaintiff's Motion regarding the Jury Questionnaire is GRANTED pursuant to agreement of the parties;

26. Plaintiff's Objections to John Crane's Exhibit List and Literature Designations are reserved for trial;

27. John Crane's Objections to Plaintiff's Exhibit List and Reliance Articles are reserved for trial;

28. As of the date of this Order, the following motions in *Limine* are pending and will be heard and ruled upon at a later time:

A. Plaintiff's Motion in *Limine* to Limit the Testimony of Dr. James Crapo;

B. Plaintiff's Motion in *Limine* to Limit the Testimony of Dr. Bruce Case;

C. Plaintiff's Motion in *Limine* to Prohibit the Testimony of James R. Thornton;

D. John Crane's Motion to Quash the *De Bene Esse* Deposition of Jim Walker;

E. John Crane's Motion to Quash the Testimony of Terrence McNamara;

Entered this 1st day of April, 2007, *nunc pro tunc* March 26, 2007.

/s/ Timothy S. Fisher
The Honorable Timothy S. Fisher

I certify that the documents to which this authentication is affixed are true copies of a record in the Newport News Circuit Court, that I have custody of the record and that I am the custodian of that record.

Rex A. Davis, Clerk

By: /s/_____D.C.

SEEN AND OBJECTED TO for all the reasons stated on the transcripts of the hearings on March 16, March 23, and March 26, and for the reasons stated in the briefs filed by the parties.

/s/ Robert R. Hatten
*Counsel for Plaintiff*
Robert R. Hatten, Esq.
J. Conard Metcalf, Esq.
Hugh B. McCormick, Esq.
William W.C. Harty, Esq.
Erin E. Hieronimus, Esq.

As to Par 10, Plaintiff opened this discussion in its Opening Statement and defendant responded as to Paragraph 20, John Crane's objection as to any conclusions of law and not the limited two listed in this order. As to Par 9 John Crane's motion was denied because plaintiff's motion was accepted provided it appeal to both parties. With these objections and those noted in the preamble paragraph above, John Crane signs this order.

/s/ Archibald Wallace, III

/s/ Archibald Wallace, III
*Counsel for Defendant*
Archibald Wallace, III, Esq.
Thomas Moran, Esq.
Patricia J. Bugg, Esq.

[ENTERED: APRIL 23, 2007]

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS**

**Sandra Key Oney, Executor of the Estate of SHARON VAUGHAN ONEY, Deceased**

**Plaintiff,**

**v.** **Case No. 00301TF**

**JOHN CRANE INC.**

**Defendant.**

**JOHN CRANE INC.'S POSTTRIAL MOTIONS TO SET ASIDE THE JURY'S VERDICT**

The Defendant, John Crane, Inc. (hereinafter "John Crane"), by counsel, moves the Court to set aside the verdict of the jury in this case as contrary to the law and the evidence and to grant it a new trial, in whole or in part, by reason of the following:

**A. VIRGINIA'S STANDARD ON SETTING ASIDE A JURY VERDICT**

When the trial court considers a motion to set aside a verdict, it must consider all the evidence. T.M. Graves Construction, Inc. v. Nat'l Cellulose Corp., 226 Va. 164, 169, 306 S.E.2d 898, 901 (1983). In order to grant such a motion, "the trial court must be satisfied from the evidence adduced either that there was no evidence to support the verdict, or that the verdict was plainly contrary to the evidence. This conclusion must be drawn from the whole

evidence in the case." Id. (emphasis in original); see also Jenkins v. Pyles, 269 Va. 383, 388, 611 S.E.2d 404, 407 (2005) (holding that the trial court may only set aside the jury verdict if it is "plainly wrong or without credible evidence to support it"). In arriving at this conclusion, "the trial court...must place itself in the jury's shoes. It must see what the jury saw so that it can decide whether any credible evidence exists to support the jury's verdict." T.M. Graves, 226 Va. at 169. The party which

* * *

of all trades of each ship on which he worked, and that the cause of his mesothelioma was amosite asbestos, a component found in many other asbestos products used aboard the ships but not found in John Crane products. A copy of Dr. Case's report is attached hereto as Exhibit "L". As a result of the Court's decision, John Crane was unable to present its entire defense. The jury's excessive verdict, as detailed in B-I above, demonstrates the resulting prejudice to John Crane.

7. In further support of its argument, John Crane refers the Court to all arguments it made on this issue during the trial of this matter, which arguments are incorporated herein. See Oney TR, March 23, 2007, 140-46; April 3, 2007, 1633-1636.

## Conclusion

For the foregoing reasons, John Crane respectfully requests that this Court set aside the jury's verdict in this case and award a new trial on

all issues on the grounds that it was unfairly prejudiced by the Court's refusal to allow Dr. Case to testify in any manner, and for the reasons already discussed in the record.

## V. DEFENDANT JOHN CRANE'S POSTTRIAL MOTION (B-V) TO SET ASIDE THE VERDICT ON THE GROUNDS THAT 1) THE VERDICT FORM WAS INCOMPLETE AS SUBMITTED TO THE JURY AND 2) WAS INCOMPLETELY SUBMITTED BY THE JURY

John Crane, by counsel, respectfully asks the Court to set aside the verdict reached by the jury and to award a new trial on the grounds that (1) the Verdict Form ultimately approved for use by the jury improperly excluded various corporations whose products contributed to the decedent's injury under the uncontroverted evidence of the case, and that (2) the jury failed to properly complete the form it was given. In support thereof, John Crane states the following:

1. The Verdict Form submitted to the jury had allocations for only two manufacturers of asbestos products: John Crane and Garlock.

2. Other than John Crane and Garlock, Plaintiff's own witnesses, Mr. Oney, through videotaped deposition, Mr. Silver, Mr. Staley, and Mr. Bond, testified at trial that they and Mr. Oney were regularly and routinely exposed to products manufactured by the following:

a. Johns-Manville (Oney TR, March 27, 2007, 469, 481; March 28, 2007, 580, 670)

b. Flexitallic (Oney TR March 27, 2007, 469; April 2, 2007, 1222-23)

3. In his testimony of March 28, 2007, Plaintiff's expert, Dr. Maddox, also provided a detailed list of asbestos-containing products to which machinists such as Mr. Oney were routinely exposed while working at the Shipyard:

pipe insulations
mud/cement
cloth/insulation
boilers
asbestos board

though the manufacturers of the same were not identified. (Oney TR March 27, 2007, 722-24)

4. John Crane submits that all of the manufacturers and products listed in ¶¶ 2 and 3 above should have been included on the Verdict Form, especially in light of Plaintiff's expert's testimony that each of Mr. Oney's exposures eventually causes his mesothelioma. (Dr. Maddox's testimony at Oney TR, March 29, 2007, 803-4).

5. In further support of this argument, John Crane restates and refers the Court to (a) its arguments during trial (Oney TR April 9, 2007, 2258-2263) as well as (b) John Crane Inc.'s Reply to Plaintiff's Motion *in Limine* to Apply Joint and Several Liability and Prohibit Allocation of

Comparative Fault to Non-Party Entities, (c) John Crane's Response to Plaintiff's Motion *in Limine* to Prohibit Evidence Relating to Negligence of Non-Party and/or Bankrupt Companies, (d) John Crane's Motion to 1) Apportion Fault of Judgment-Proof Defendant Proportionally Among Both Settling and Nonsettling Defendant, and 2) Permit the Jury to Apportion Fault to Employer Shipyard and Memorandum in Support, (e) arguments contained in B-VI infra, and (f) the testimony of Dr. Maddox as a whole.

6. Even assuming that the verdict form was proper with just the two manufacturers listed, the jury clearly failed to consider all of the evidence before reaching its decision on apportionment. Several times throughout the testimonies of Plaintiff's witnesses, Mr. Oney and his co-workers identified Garlock's gaskets as the most popular gaskets in the shipyard and the gaskets that Mr. Oney used most often. (Oney TR, March 28, 2007, 646; April 2, 2007, 1226, 1232). While the evidence, therefore, demonstrated that John Crane's products were used less than, or at most, equal to Garlock's products, the statement by Plaintiff's counsel in closing that the jury should award 75% of the damages to John Crane and only 25% to John Crane (Oney TR, April 9, 2007, 2007, 2439) had potential to improperly influence the injury in inserting an element of punishment into the verdict when they did not find that such punishment was warranted in this case. The jury's own concerns, brought to the attention of the court during deliberations, further evince the jury's confusion and unwillingness to apportion the proper amount of damages to Garlock:

"Why was Garlock in the lawsuit? Why are we being asked to split the award between Garlock and Crane when we were told the case would be Oney vs. Crane?" Oney TR, April 10, 2007, 2542.)

7. In finding that Garlock's products did not contribute to Mr. Oney's injury in an equal or greater percentage than those of John Crane, the jury's apportionment scheme was arbitrary, improper, and against the manifest weight of the evidence. The result was to impose on John Crane 60% of the total injury when, in reality, the evidence was that its products were used by Mr. Oney less than those of other manufacturers. See Rome v. Kelly Springfield Tire Co., 217 Va. 943, 948, 234 S.E.2d 277, 281 (1977).

8. As more fully set forthe in B-I above, here, the issues of liability and amount "cannot be reconciled with any logical interpretation of the evidence as to damages." See Rome and Doe v. West, 220 Va. 440, 445, 281 S.E.2d 850, 852-53 (citing Rome, 217 Va. 943), except to say that the jury was confused, improperly motivated, and wrongly acting. When a jury allows itself to be improperly influenced, so that it disregards the uncontroverted evidence, the Court's proper action is to set aside the verdict and order a new trial. See Rome, 217 Va. 948-49.

## Conclusion

For the foregoing reasons and those in the record, John Crane respectfully requests that this Court set aside the jury's verdict in this case and award a new trial on all issues on the grounds (1)

that the Verdict Form was improperly submitted to the jury, and (2) that the jury improperly completed the form it was given.

## VI. DEFENDANT, JOHN CRANE, INC.'S POST TRIAL MOTION (B-VI) TO SET ASIDE THE VERDICT ON THE GROUNDS THAT JOHN CRANE WAS IMPROPERLY REQUIRED TO IDENTIFY OTHER PRODUCTS THAT CONTRIBUTED TO MR. ONEY'S INJURIES BY THE MANUFACTURER'S NAME RATHER THAN BY GENERIC PRODUCT TYPE

John Crane, by counsel, respectfully asks the Court to set aside the verdict reached by the jury and to award a new trial on the grounds that John Crane was improperly required to identify other products that contributed to Mr. Oney's injury by the manufacturer's name rather than by generic product type. In support thereof, John Crane states the following:

1. The Verdict Form submitted to the jury had allocations for only two manufacturers of asbestos products: John Crane and Garlock, which both manufactured gaskets and packing to which Mr. Oney claims exposure.

2. Other than John Crane and Garlock, Plaintiff's own witnesses, including Mr. Oney and his co-workers, testified that they and Mr. Oney were repeatedly exposed to several asbestos-

containing products other than gaskets and packing, including the following:

a. pipecovering (Oney TR, March 28, 2007, 573, 691, 696; April 2007, 1215)

b. boilers (Oney TR, March 28, 2007, 696)

c. turbines (Oney TR, March 28, 2007, 696)

3. Plaintiff's expert, Dr. Maddox, also provided a list of asbestos-containing products to which machinists such as Mr. Oney were routinely exposed while working at the Shipyard:

pipe insulation
mud/cement
cloth/insulation
boilers
asbestos board

(Oney TR March 27, 2007, 722-24)

4. In light of the abundant testimony that Mr. Oney was frequently exposed to other asbestos-containing products, especially pipecovering, the contribution of those products to Mr. Oney's mesothelioma should have been taken into consideration by the jury on the jury form. Requiring John Crane to elicit precise manufacturer names of the myriad other asbestos-containing products to which Mr. Oney was exposed was unduly burdensome and prejudicial to John Crane.

5. In further support of its argument, John Crane refers the Court to all arguments made during trial (Oney, TR, April 9, 2007, 2285-2264).

## Conclusion

For the foregoing reasons, and those in the record, John Crane respectfully request that this Court set aside the jury's verdict in this case and award a new trial on all issues on the grounds that John Crane was improperly required to identify other products to which Mr. Oney was exposed, and which contributed and/or caused his mesothelioma, by specific manufacturer name rather than by generic product type.

## VII. DEFENDANT, JOHN CRANE INC.'S POSTTRIAL MOTION (B-VII) TO SET ASIDE THE VERDICT ON THE GROUNDS THAT THE COURT ERRED IN APPLYING GENERAL MARITIME LAW RATHER THAN VIRGINIA LAW

John Crane, by counsel, respectfully asks the Court to set aside the verdict reached by the jury and to award a new trial on the ground that the Court erred in applying general maritime law rather than Virginia law to the present case. In support thereof, John Crane states the following:

On February 26, 2007, John Crane filed its Motion to Apply Virginia Law and Memorandum in Support. Because the arguments raised therein are the same as those raised in this pretrial motion, John Crane restates and incorporates its previously

filed Motion to Apply Virginia Law and Memorandum in Support as if fully set forth herein.

Therefore, for the foregoing reasons and the reasons set forth in John Crane's previously filed motion, John Crane respectfully requests that this Court set aside the jury's verdict in this case and order a new trial on the grounds that general maritime law was improperly applied to this case.

## VIII. DEFENDANT, JOHN CRANE INC.'S POSTTRIAL MOTION (B-VIII) TO SET ASIDE THE VERDICT ON THE GROUNDS THAT THE CLAIM FOR PUNITIVE DAMAGES WAS IMPROPERLY SUBMITTED TO THE JURY

The defendant, John Crane, by counsel, respectfully asks this Court to set aside the verdict reached by the jury and to award a new trial on the grounds that Plaintiff's claim for punitive damages was improperly submitted to the jury. In support thereof, John Crane states the following:

1. In the Final Pretrial Conference held March 16, 2006, the Court heard and rejected John Crane's Motion to Preclude Punitive Damages, filed February 26, 2007 in which John Crane asserted that punitive damages were impermissible in a maritime wrongful death action such as the present case. That motion is restated and incorporated herein as if fully set forth.

2. Without waiving its objections to the allowance of a claim for punitive damages in a maritime setting, on April 5, 2007 John Crane moved to strike the punitive damages claim of Plaintiff for reason that Plaintiff had not presented a case for punitives, which motion was also rejected by the Court. Oney, TR, April 5, 2007, 1833-1846. John Crane restated and incorporates herein all arguments made during trial. Id.

3. John Crane renewed its Motion to Strike the Punitive Damages claim on April 9, 2007, which Motion was again rejected by the Court. Oney, TR April 9, 2007, 2271-75, 2342. John Crane restates and incorporates herein all arguments made during trial. Id.

4. In each instance, allowing Plaintiff's punitive claim to proceed was improper. First as is more fully set forth in John Crane's Pretrial Motion to Preclude Punitive Damages, filed February 26, 2007, punitive damages are not available for Plaintiff under the general maritime law. Second, even if the general maritime law does recognize claims for punitive damages, Plaintiff in this case failed to make a case for punitive damages.

5. Virginia law provides that "negligence which is so willful or wanton as to evince a conscious disregard of the rights of others, as well as malicious conduct, will support an award of punitive damages." Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 144, 413 S.E.2d 630, 640 (1992). Virginia defines "willful and wanton negligence" as "acting consciously in disregard of another persons' rights or acting with reckless indifference to the

consequences, with the defendant aware, from his knowledge or existing circumstances and conditions, that his conduct probably would cause injury to another." Id. Note, however, that "the imposition of punitive damages [in Virginia] is not favored generally and, 'because punitive damages are in the nature of a penalty, they should be awarded only in cases of the most egregious conduct.'" Id. citing Philip Morris Inc. v. Emerson, 235 Va. 380, 407, 368 S.E.2d 268, 283 (1998).

In Watson, punitive damages were properly awarded because the defendant, Owens-Corning, knew that inhalation of dust from its kaylo product could cause lung disease in humans, it actively concealed this danger, and it did not warn insulators of this hazard even though it warned its own employees. Watson, 243 Va. at 148. These three elements are lacking in the present case, as there is no proof that John Crane actively concealed any knowledge of the risks associated with use of its products. Nor is there evidence that John Crane definitively knew of the dangers associated with its products and chose not to warn consumers of the same. In fact, the jury here found that John Crane's conduct did not rise to a level of conduct that would justify an imposition of punitive damages.

6. Despite finding that John Crane's conduct did not justify an award of punitive damages, however, it may be inferred that the jury's ultimate award of compensatory damages improperly contained an element of punishment, which resulted from simply permitting the punitive claim to go to the jury. Though the taint resulting

from the improper submission of Plaintiff's punitive claim to the jury cannot be measured, it is entirely inferable that such action by the Court improperly influenced the jury in granting its excessive award of compensatory damages - $9.2 million, an amount grossly exceeding the special damages claimed in this case. See B-I supra.

7. Similar to Virginia law, under general maritime law, punitive damages are available only where a defendant's "intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others." CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 699 (1st Cir. 1995); In re: the Exxon Valdez, 270 F.3d 1215, n. 14 (9th Cir. 2001) (noting that to allow punitive damages a defendant's conduct must be "intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others"); See In the Matter of the Complaint of Cameron Boat Rentals, Inc., 683 F.Supp. 577, 585 (W.D. La. 1988) (finding that willful and wanton conduct is the standard for imposing punitive damages). Under either a Virginia or Admiralty setting, Plaintiff did not demonstrate during trial that John Crane's actions amounted to willful or wanton conduct.

## Conclusion

Because Plaintiff failed to present a case in which punitive damages could be awarded, John Crane respectfully requests this Court to set aside the jury's verdict in this case and award a new trial on the grounds that permitting the punitive damages claim to the jury was improper.

## IX. DEFENDANT, JOHN CRANE INC.'S POSTTRIAL MOTION (B-IX) TO SET ASIDE THE VERDICT ON THE GROUNDS THAT ITS MOTION TO STAY THE PROCEEDINGS WAS IMPROPERLY DENIED

John Crane, by counsel, respectfully asks this Court to set aside the jury's verdict in this case and award a new trial on the grounds that John Crane's Motion to Stay should have been granted, and in support thereof states the following:

1. On December 21, 2006, John Crane filed its Motion to Stay Proceedings and Memorandum in Support in which John Crane asserted that a stay was proper because its appeal of a previous case, Garland Jones v. John Crane, Newport News Circuit Court, No. 39028T-01, was pending before the Virginia Supreme Court, and in that appeal, several issues, including excessiveness of the verdict, were to be resolved. Thereafter, on March 7, 2007, after the Virginia Supreme Court granted its writ of appeal, John Crane filed its Renewed Motion to Stay Proceedings and Memorandum in Support, which is restated and incorporated herein. A hearing on John Crane's Renewed Motion to Stay Proceedings was held March 16, 2007, at which time the Court denied the motion despite the appeal's potential to disrupt the issues presented in this case.

2. While a motion to stay is within the sound discretion of the court, in the present case, a denial of John Crane's motion was improper

especially in light of the excessiveness of the verdict submitted by this jury. Childers Foods, Inc. v. Rockingham Poultry Marking Co-op, 203 F.Supp. 794, 796 (W.D. Va. 1962) (holding that "[a] motion to stay proceedings is addressed to the sound discretion of the court, and the denial or grant of a stay is predicated upon the inherent power of a court to control its docket").

3. In Jones, a judgment against John Crane was entered for $3,400,000, which amount represented 34% of the total judgment. The excessiveness of this verdict is on appeal to the Virginia Supreme Court and will be decided during the June session.

4. In the present case, the jury returned a verdict for Plaintiff of $9,251,392.06, of which John Crane is required to pay 60%, or approximately $5.5 million. Had the Motion to Stay Proceedings been granted, and the award in Jones then been reduced or vacated, the jury would not have been permitted to enter such an excessive verdict in this case.

5. In further support of its argument, John Crane directs the Court to its arguments made in Pretrial Motion B-I above and all arguments made at the hearings on the Motion to Stay.

## Conclusion

For the foregoing reasons, John Crane respectfully requests this Court to set aside the jury's verdict in this case and grant a new trial on all issues on the grounds that the proceedings should

have been stayed until resolution of the pending appeal in Jones.

## X. DEFENDANT JOHN CRANE INC.'S POSTTRIAL MOTION (B-X) TO SET ASIDE THE VERDICT ON THE GROUNDS THAT THE TESTIMONY OF JAMES THORNTON WAS IMPROPERLY LIMITED

John Crane, by counsel, respectfully requests this Court to set aside the jury's verdict in this case and award a new trial on the grounds that the testimony of James Thornton was improperly limited to exclude testimony regarding the substitution program in place at the Newport News Shipyard during his employ. In support thereof, John Crane states the following:

1. On April 5, 2007, John Crane called as a witness James R. Thornton, Direct of Environmental Health and Safety for the Shipyard, to testify about his duties as an industrial hygienist at Newport News Shipyard, the protocol at the Shipyard for using asbestos, and what he observed and directed about the use of gaskets and packing materials at the Shipyard, including his and the Shipyard's determination that gaskets and packing materials did not emit enough asbestos during their normal and intended use to violate the OSHA Standards in existence at the time of Mr. Oney's alleged exposure. Oney TR, April 15, 2007, 1961-2022; see also disclosure of James Thornton provided in John Crane's List of Factual and Expert

Witnesses Who Will or May Be Called to Testify at Trial, attached hereto as Exhibit "M"; see also John Crane Inc.'s Reply to Plaintiff's Motion in Limine RE James R. Thornton, filed March 21, 2007, a copy of which is attached hereto as Exhibit "N". At no time did John Crane intend to elicit testimony from Mr. Thornton concerning the knowledge and/or negligence of the Newport News Shipyard. See Exhibit "M" identified above.

2. At trial, John Crane sought to question Mr. Thornton about whether the Shipyard, after conducting various air sampling tests at the direction of Mr. Thornton, permitted asbestos gaskets and packing to remain at the Shipyard though other products were removed and/or substituted for other non-asbestos products. (Oney TR, April 5, 2007, 1967-1997). In other words, John Crane sough to elicit testimony that while the Shipyard, under its substitution program in place when Mr. Thornton came to work there, removed most of the asbestos-containing products from its yard, gaskets and packing materials were continued to be used at the yard, as their use complied with OSHA. Id.

3. The Court excluded this line of questioning due to its concern that the same would necessarily evoke to the jury the Shipyard's knowledge and/or negligence, which was ruled pretrial to be improper. (Oney TR, April 5, 2007, 1978-83).

4. Such a ruling was improper because the purpose behind this line of questions was not to

bring out the potential negligence of the Shipyard, but rather to demonstrate first that when used in their normal and foreseeable manner at the Shipyard, gaskets and packing did not emit fibers in excess of what was permitted by OSHA at the time of Mr. Oney's exposures. That being so, John Crane owed no duty to warn of any dangers associated with the use of its products, as they cannot be said to be inherently dangerous. Second, the questions sought to demonstrate that because their use complied with OSHA, gaskets and pakcing material were allowed to remain in use at the Shipyard, while other asbestos-containing products were removed and/or substituted. Oney TR, April 5, 2007, 1978-9). Such evidence further related to the state of the art and the standards in place during the period of Mr. Oney's alleged exposure, which is clearly material to this case.

5. In further support of its argument, John Crane refers the Court to its arguments made at trial (Oney TR, April 5, 2007, 1961-2022).

**Conclusion**

For the foregoing reasons, John Crane respectfully requests this Court to set aside the jury's verdict in this case and grant a new trial on all issues on the grounds that Mr. Thornton should have been permitted to testify regarding the exemption of gaskets and packing material from the Shipyard's substitution program.

## XI. DEFENDANT, JOHN CRANE INC.'S POST TRIAL MOTION (B-XI) TO SET ASIDE THE VERDICT ON THE GROUNDS THAT THE COURT IMPROPERLY RELIED ON THE RULINGS OF JUDGES IN PAST CASES WITHOUT FULLY CONSIDERING THE EVIDENCE AND LAW PRESENTED

John Crane, by counsel, respectfully asks this Court to set aside the jury's verdict and grant a new trial on the grounds that the Court improperly relied on the rulings of judges in past cases without providing John Crane an adequate opportunity to submit new evidence and/or argument. In support thereof, John crane states the following:

1. During a hearing in this matter held February 26, 2007, during which John Crane sought to exclude the testimony of Plaintiff's experts regarding the "every fiber contributes" theory of causation as unreliable and untested, the Court indicated that it intended to admit everything that was ruled admissible in last year's cause of Jones v. John Crane, Case No. 39028T-01, Newport News Circuit Court. Specifically, the Court stated that "anything [Plaintiff's experts] testified to in Jones is admissible in this case." Oney TR, February 26, 2007, 74; see also Id. at 57-77. John Crane objected, noting that such a ruling fails to take into account how certain testimony may have come up or how evidence may have been presented. Id. at 74.

Additionally, John Crane asserted that it should not be stuck with decisions to object, not object, and other like decisions, made by it in a previous case when, hopefully, it is smarter today than yesterday. Id. at 65.

2. In addressing this issue, at the final pretrial conference held March 16, 2007, the Court clarified that its decision to "follow...what has been done," stemmed from its desire to maintain consistency within the circuit. Oney, TR, March 16, 2007, 30-32. The Court's desire to maintain consistency within the circuit, however, does not take into account that in previous cases similar issues may not have been raised and thus were not objected to, different evidence may have been presented, and different circumstances and/or facts may have warranted different results. Citing consistency as the overall rational for adhering to previous decisions creates a box into which all issues simply cannot fit and in which they cannot be properly handled.

**Conclusion**

For the foregoing reasons, and because its ability to have a full and fair trial was deeply impaired, John Crane respectfully requests that this Court set aside the jury's verdict and order a new trial on the grounds that the Court consistently and improperly relied on the previous rulings of judges in other cases.

## XII. DEFENDANT JOHN CRANE, INC.'S POST TRIAL MOTION (B-XII) AFFIRMING ALL OBJECTIONS AND ARGUMENTS RAISED BEFORE, DURING AND AFTER TRIAL

1. John Crane, by counsel, respectfully asks the Court to affirm John Crane's preservation for the record of any and all objections, exceptions, defenses, and arguments made by John Crane in all motions, briefs, memoranda, and oral argument before this Court not otherwise raised in this Posttrial Motion, whether the same occurred or were filed before, during, or after trial in this case.

2. John Crane further asks the Court to affirm that John Crane has not waived or withdrawn any objection, exception, or argument it has made before, during or after trial, unless John Crane has expressly stated otherwise.

3. John Crane further states that it adheres to any and all defenses, arguments or objections contained in the following documents it has filed with this Court and made during oral arguments of the same, except where a particular defense, argument or objection has been expressly waived or withdrawn by John Crane:

> Motion to Apply Virginia Law and Memorandum in Support, filed February 26, 2007
>
> Motion to Apportion Fault Proportionately and Allow Fault of Judgment-Proof Defendant

Proportionately among Both Settling and Nonsettling Defendants, and 2) Permit the Jury to Apportion Fault to Employer Shipyard, and Memorandum in Support, filed February 26, 2007

Motion to Preclude Punitive Damages, filed February 26, 2007

Motion to Exclude Testimony Regarding any Asbestos-Related Disease other than Mesothelioma and Memorandum in Support, filed February 26, 2007

Motion to Prohibit and/or Limit Motions in Limine at Trial, filed February 26, 2007

Motion to Exclude Evidence that Relates to Knowledge or State of the Art that Post Dates John Crane's Last Date of Manufacture, filed February 26, 2007

Motion in Limine to Exclude Exhibits Showing the Knowledge of Associations of Which John Crane was Not a Member and Memorandum in Support, filed February 26, 2007

Motion to Prohibit Experts from Expressing any Opinion that Constitutes a Conclusion of Law or Goes to the Ultimate Issue of the Case, filed February 26, 2007

Motion to Determine Sufficiency of Expert Disclosures at Pretrial Conference, filed February 26, 2007

Motion to Stay Proceedings and Memorandum in Support, filed December 21, 2006

Renewed Motion to Stay Proceedings and Memorandum in Support, filed December 21, 2006

Renewed Motion to Stay Proceedings and Memorandum in Support, filed March 7, 2007.

Motion to Prohibit Plaintiff's Reference to the "Every Fiber Contributes" Theory of Causation and to Prohibit Plaintiff's Experts from Testifying as to an Ultimate Issue of Fact, and Memorandum in Support

Opposition to Plaintiff's Motion to Apply Joint and Several Liability and Prohibit Allocation of Comparative Fault to Non-Party Entities, filed March 6, 2007

Opposition to Plaintiff's Motion to Apply "Should Have Known" Standard of Care, filed March 6, 2007

Opposition to Plaintiff's Motion to Prohibit Evidence Relating to Negligence of Non-Party and/or Bankrupt Companies, filed March 6, 2007

Opposition to Plaintiff's Motion to Strike Defendant's Government Contractor Defense, filed March 6, 2007

Opposition to Plaintiff's Motion to Strike Defendant's Sophisticated User/Equal Knowledge Defense, filed March 6, 2007

Response to Plaintiff's Motion to Prohibit Defendants from Claiming Its Products Are Exempt from OSHA's Warning Requirements, filed March 6, 2007

Response to Plaintiff's Motion to Prohibit Reference to Lack of Autopsy, filed March 6, 2007

Response to Plaintiff's Brief and Motion in Limine to Prohibit the Direct or Indirect Use of the Deposition of any Witness Who Testified Where the Plaintiff Was Not a Party or Present at the Time of the Deposition, filed March 6, 2007

Reply to Plaintiff's Motion to Strike Testimony of Paul Steward, filed March 21, 2007

Reply to Plaintiff's Motion to Stike Testimony of James Delaney, filed March 21, 2007

Reply to Plaintiff's Motion to Limit Testimony of Dr. Bruce Case, filed March 22, 2007

Reply to Plaintiff's Motion to Limit Testimony of Dr. James Crapo, filed March 21, 2007

Reply to Plaintiff's Motion in Limine RE James R. Thornton, filed March 21, 2007

Motion to Dismiss, or Alternatively, to Permit a Spoliation or Missing Evidence Inference against the Plaintiff

John Crane's Motion in Limine to exclude the testimony of Terrence McNamara

John Crane's Opposition to some of Plaintiff's requested instructions and John Crane's Objection to the court's rulings on its exceptions

John Crane's Objections and Motions made during the trial.

WHEREFORE, for the reasons stated, John Crane respectfully requests the Court to grant it a new trial on any and all issues, or in the alternative, for remittitur.

Respectfully submitted,

**JOHN CRANE INC.,**

By Counsel

/s/ Patricia J. Bugg
Archibald Wallace, III (VSB #06005)
Patricia J. Bugg (VSB #72775)
Stephen A. Bryant (VSB #16948)
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and

Daniel J. O'Connell
O'Connell, Tivin Miller & Burns, LLC
645 Tollgate Road, Suite 220
Elgin, Illinois 60123

*Counsel for John Crane, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of April, 2007, a true and accurate copy of the foregoing was sent via email and U.S. Mail, postage prepaid to:

Robert R. Hatten, Esq.
PATTEN, WORNOM, HATTEN & DIAMONSTEIN
12350 Jefferson Avenue, Suite 300
Newport News, VA 23602

*Counsel for Plaintiff*

/s/ Patricia J. Bugg

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF NEWPORT NEWS

| | | |
|---|---|---|
| SANDRA KAY ONEY, Executor | ) | |
| Of the Estate of SHARON | ) | |
| VAUGHN ONEY, Deceased, | ) | AT LAW NO. |
| Plaintiff, | ) | 00301TF |
| v. | ) | |
| | ) | |
| JOHN CRANE, INC., | ) | |
| Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
DAY 13
April 11, 2007

BEFORE:

THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

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TAYLOE ASSOCIATES, INC.
Registered Professional Reporters
Telephone: (757) 461-1984
Norfolk, Virginia

* * *

THE CLERK: We, the jury, find in favor of the plaintiff, Kay Oney.

And we, the jury, award the plaintiff, Kay Oney, damages for the following:

**A. Compensatory damages: $9 million.**

**Medical expenses: $235,644.06 -- let me say that again. $235,644.06.**

**C. Funeral expenses: $15,748.**

**We award interest on $9,251,392.06 beginning July 11th, 2007.**

**Do you want me to read that, Judge?**

THE COURT: Let me see it, please.

Yes, go ahead and read it.

THE CLERK: If you find that one or more of the companies listed below are at fault and that they substantially contributed to Vaughn Oney's injury and death, you may allocate the percentages of liability, including John Crane. The total of these percentages must be 100 percent.

If you find that John Crane is the only company at fault and that it substantially contributed to Vaughn Oney's injury and death, then you should allocate 100 percent to John Crane.

John Crane: 60 percent.

Garlock: 40 percent.

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF NEWPORT NEWS

| | | |
|---|---|---|
| SANDRA KAY ONEY, Executor | ) | |
| Of the Estate of SHARON | ) | |
| VAUGHN ONEY, Deceased, | ) | AT LAW NO. |
| Plaintiff, | ) | 00301TF |
| v. | ) | |
| | ) | |
| JOHN CRANE, INC., | ) | |
| Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
DAY 11
April 9, 2007

BEFORE:

THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

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Norfolk, Virginia

* * *

P R O C E E D I N G S

THE COURT: Good morning, everyone.

MR. HATTEN: Good morning.

MR. WALLACE: Good morning.

THE COURT: Okay. Mr. Wallace.

MR. WALLACE: When we finished Friday, we were still putting on evidence.

THE COURT: Yes, sir.

MR. WALLACE: We believe we have completed our evidence, and we rest.

MR. O'CONNELL: (Nodding head.)

MR. WALLACE: I guess I'll formally do that --

THE COURT: I just want to get the scheduling at the moment.

MR. HATTEN: Your Honor, at this time, I would move to strike the defendant's evidence as to comparative fault of the plaintiff and also as to comparative fault as to any defendant except Garlock.

I don't think there's been any evidence, any other company whose asbestos products were specifically used or worked with by Mr. Oney or worked around.

THE COURT: Okay.

MR. WALLACE: May I have just a second?

THE COURT: Sure.

MR. WALLACE: In response to the first motion that was made, the testimony has been in this trial that Mr. Oney worked from 1962 to 1994 and claims exposure throughout that period.

In view of that, in view of some of his witnesses, remembering that there were protections and safeguards against that asbestos from the mid '70s on, he then had the potential for exposure those last 19 years of his work life.

We have instructions and we'll argue them in a minute and the Court may deal with this issue at that point, so we have instructions that speaks to the fact that if he had exposures during those time frames, it was contributory negligence on his part as to the negligence.

THE COURT: The question is not the instructions at this point. It's the evidence that's come out in the courtroom.

MR. WALLACE: I know.

THE COURT: Is there any evidence, frankly, of Mr. Oney being negligent in any way from any witness from any year?

MR. WALLACE: I don't think so up until 1975 when the safety and precautionary things were in the shipyard. And his witnesses have testified yes, from that point we were warned and we had --

THE COURT: The question was, was there any evidence that he didn't comply with any of that?

MR. WALLACE: No.

THE COURT: Okay. So then it would appear appropriate to grant the motion?

MR. WALLACE: Probably. I just don't want to give it away.

THE COURT: Well, that's fine. Don't may my job any easier.

All right. The motion to strike the comparative negligence of the defendant is granted.

MR. HATTEN: Comparative negligence of the plaintiff.

THE COURT: Of the plaintiff is granted. Thank you. He said contributory and got me off the track.

MR. WALLACE: On the second issue, the testimony has been probably a little different than Mr. Hatten is sharing. For example, Mr. Oney was very clear in saying 2150 and SS6 AM were the only two that he saw that he worked with, but Mr. Stanley names not only John Crane gaskets and packing, Garlock gaskets and packing, but he named Johns-Manville gaskets and packing. He also named products that he used and Mr. Oney used also. He also named asbestos sections cement and cloth. Mr. Silver --

THE COURT: That's a product. Was there anyone identified as making that?

MR. WALLACE: Say again.

THE COURT: That's a product --

MR. WALLACE: No, nobody was identified as making it, but if you are exposed to an asbestos product, I think you can deal with it under a category of other asbestos products; you don't have to say who made it, per se.

THE COURT: He is just talking about striking national defendants at the moment.

MR. WALLACE: I'm the only defendant. I'd love for me to be stricken.

MR. HATTEN: Any --

THE COURT: The only active defendant at the moment.

MR. HATTEN: Their burden of proof as to anyone who has settled that they have to make a case against, there's been no claim filed against Johns-Manville and there's been no -- there has been a settlement with Garlock and there has been proof of Garlock and that's why we conceded to Garlock.

THE COURT: Interestingly enough, I don't think there was a product identified from Johns-Manville; just said that --

MR. WALLACE: Mr. Stanley did identify gaskets and packing made by Johns-Manville.

THE COURT: I was focused on Flexitallic, but apparently that's not asbestos?

MR. WALLACE: It is, but it's another product. I think --

MR. HATTEN: Flexitallic is a bankrupt company, also we have no claim against. You can't put Johns-Manville on the form unless you filed a claim, and we have not filed a claim because joint and several liability applies to maritime law and there's been no claim filed.

And they have a right to file a claim for contribution or indemnity after a verdict against Manville Trust.

THE COURT: I agree certainly about Garlock, and I agree Johns-Manville was mentioned. But as far as the legal argument on Johns-Manville, wouldn't it be appropriate for that defendant not to stay as somebody they can --

MR. WALLACE: Not as long as they have a claim.

MR. HATTEN: I don't have a claim.

THE COURT: He doesn't have one.

MR. HATTEN: I've not filed any claim.

THE COURT: That was my understanding from the beginning. And that's when I understood very few things. I understand a little bit more now.

MR. WALLACE: Well, you know, we're in this sort of Catch-22, Your Honor.

THE COURT: I understand.

MR. WALLACE: In the beginning Mr. Hatten says to the jury, don't worry; you'll see it's not just John Crane. But then when he gets to this point, he says to you, we don't want anybody but John Crane. So it's a Catch-22. He can tell them at the beginning it's one thing, but then at the end he comes back and says, no, you can't do anybody but, and we disagree on the law on the issue of apportionment and who should be on the verdict form anyway. And we've been steadfast on that before trial in motions and throughout trial. We'll argue instructions on that in just a few minutes.

MR. HATTEN: The burden of proof on contributing cause is on the defense. And the law prohibits parties that have not been named or haven't settled. And so, you know, you have to operate within the strictures of what the Supreme Court says who can be on that form. You have to prove your case. And the only one you provide a prima facie case against that the Supreme Court permits is Garlock.

MR. WALLACE: The Supreme Court rule that Mr. Hatten cites and that this Court through Judge Tench has followed is the dictum by an opinion that was written saying, in essence, you got questions in this area. That issue has never really been resolved by the Virginia Supreme Court.

THE COURT: Regardless of what he said in the opening statement, there's clearly, I assume from the defendant, is an interest in this case and demonstrating that the thermal insulation

around the pipe covering containing amosite caused the plaintiff's mesothelioma.

MR. WALLACE: That's my position.

THE COURT: I understand. Now, there was never a manufacturer identified -- assuming we ever got to that point, there was never a manufacturer identified of that product to vacate the defendant in this case.

Now, the defendant can certainly say, we don't know who made it, but that stuff caused the injury. I don't know that we really got to that point either.

MR. WALLACE: I don't think that's Mr. Hatten's argument.

THE COURT: No. But I think in his opening statement he may very well have been anticipating something along that line.

MR. HATTEN: Judge, you already ruled on this in pretrial. You said the motion to -- plaintiff's motion to prohibit evidence relating to the negligence of non party and/or bankrupt companies is granted.

THE COURT: Right.

MR. HATTEN: Of course, the allocation of damages doesn't involve any bankrupt companies in this case.

THE COURT: We're now down to the point of who has to prove it. It may have been

the word "Garlock" might never have gotten mentioned.

MR. WALLACE: Johns-Manville was proven, but he doesn't want you to allow it.

THE COURT: It's bankrupt.

MR. WALLACE: It's not bankrupt. It's come out of bankruptcy, has a trust, and it has money, and it pays handsomely.

MR. HATTEN: If you file a claim against the Manville Trust, then they can be put on the verdict form unless you disclaim it before the trial. But if you don't file a claim against them, then you have no -- they can't put it on the jury verdict form at all.

I've confirmed this with the general counsel for the Manville Trust as part of all the documents. I was on the committee that reorganized the Manville Trust and wrote that document.

THE COURT: I think Garlock can stay; the others cannot, so I'll grant that motion.

MR. HATTEN: Thank you.

THE COURT: Any other motions, Mr. Hatten?

MR. HATTEN: I have no other motions.

THE COURT: Any motions, Mr. Wallace?

MR. WALLACE: I have one. It was a question I might bring to the Court's attention.

On April 5th, which was Thursday, the Court admonished the jury about some type of discussion. And the Court was not -- did not share with anyone -- or at least with us -- what that discussion was or what the admonition was.

The suggestion is -- and I may be incorrect and I certainly would be happy to hear that,

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF NEWPORT NEWS

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|---|---|---|
| SANDRA KAY ONEY, Executor | ) | |
| Of the Estate of SHARON | ) | |
| VAUGHN ONEY, Deceased, | ) | AT LAW NO. |
| Plaintiff, | ) | 00301TF |
| v. | ) | |
| | ) | |
| JOHN CRANE, INC., | ) | |
| Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
DAY 8
April 4, 2007

BEFORE:

THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

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**Dr. Marks, a radiologist, and we saw Dr. Harpole, a surgeon, and they told us that nothing more could be done.**

**At this time we saw Dr. Kessler, the oncologist. He did chemotherapy with cis-platin and Alimta, three sessions of that. He referred us to Dr. Layser, radiologist, who did 14 sessions and nothing -- nothing was successful. We tried everything.**

**We checked into a clinical trial. He didn't qualify.**

**By the time he was diagnosed, he was in stage IV -- I'm sorry Nothing could be done.**

Q. Kay, did you keep a notebook of all the different doctors' appointments and all the questions and the answers and all the different things that you had to do there for about two years?

**A. I did, yes. I was the primary caregiver for my 94-year-old mother and Vaughn. And I had to keep all my records straight. Of course I also wanted to be prepared when I went with him to his doctors' visits. We went to the doctor 82 times in 2006. I went with him every time. When he was hospitalized I spent every night. If I was not allowed in the room with him, I stayed in the waiting room.**

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF NEWPORT NEWS

| | | |
|---|---|---|
| SANDRA KAY ONEY, Executor Of the Estate of SHARON VAUGHN ONEY, Deceased, Plaintiff, | ) | AT LAW NO. 00301TF |
| v. | ) | |
| JOHN CRANE, INC., Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
DAY 6
April 2, 2007

BEFORE:

THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

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Q. Would it be fair to say when you got to the KENNEDY Mr. Oney had already been working there before you got there?

**A. Yeah.**

Q. And would it be fair to say that, I don't know what products he worked on before I got there?

**A. That's correct.**

Q. Would it be fair to say, I don't know how long he worked on the KENNEDY?

**A. That would be -- yes.**

Q. Now, Mr. Oney became a supervisor during the time that you knew him, correct?

**A. Correct.**

Q. And once he became a supervisor, there was -- he wouldn't have to cut his own gaskets as much, correct?

**A. That's correct.**

Q. And he was not doing as much hands-on work as he did as a mechanic or as a helper?

**A. That's correct.**

Q. Isn't it a fact you don't recall that he ever cut a gasket or packing when he was a supervisor?

**A. Not when he was supervising; I don't know.**

Q. Did you ever use Flexitallic gaskets?

**A. Yes.**

Q. And what color were they?

**A. Bluish-gray.**

Q. Did you use them in the same places that you used the other gaskets?

**A. Yes.**

Q. For the same thing?

**A. They used them on the steam line mostly, yeah.**

Q. So you used Garlock gaskets, John Crane gaskets, Flexitallic gaskets.

Were there any others that you just can't remember the names of?

**A. No.**

Q. Do you know the name Victor as a gasket?

**A. No.**

Q. You don't recognize it as a manufacturer of gaskets that you used?

**A. I don't recall that name.**

Q. Do you recall being deposed in preparation for this case on January 22, 2007?

**A. Yes.**

Q. That was the snowstorm that you described earlier coming through to get here?

**A. Yes.**

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF NEWPORT NEWS

| | | |
|---|---|---|
| SANDRA KAY ONEY, Executor Of the Estate of SHARON VAUGHN ONEY, Deceased, Plaintiff, | ) | AT LAW NO. 00301TF |
| v. | ) | |
| JOHN CRANE, INC., Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
DAY 5
March 30, 2007

BEFORE:

THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

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**moving into the lungs and so there's no way really to keep it under control. It's very uncomfortable for the patient to do that.**

Q. That evening were you summoned back to the home?

**A. No, I was not on call, but Frances was and she came back.**

Q. And did he die on the evening --

**A. Yes, he did.**

Q. -- of November 17th at 11:20 p.m. --

**A. Yes, he did.**

Q. -- in the evening?

Throughout this time you had an opportunity to observe not only your patient, Mr. Oney, but his wife, Kay?

**A. Yes.**

Q. Can you describe for the jury the affection, care, and attention that Kay gave to her husband?

**A. She was a very devoted caregiver and spouse. She very rarely left his side. I would encourage her frequently to try and get out and, you know, just do something else besides be in the middle of all of this. Most of the time she refused. Like I said, she refused to have anybody come in from hospice**

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF NEWPORT NEWS

| | | |
|---|---|---|
| SANDRA KAY ONEY, Executor Of the Estate of SHARON VAUGHN ONEY, Deceased, Plaintiff, | ) | AT LAW NO. 00301TF |
| v. | ) | |
| JOHN CRANE, INC., Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
DAY 4
March 29, 2007

BEFORE:

THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

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THE WITNESS: And I believe that they accurately describe exposures to asbestos-containing dust from a variety of different products.

BY MR. HATTEN:

Q. And the summaries you found were consistent with what was in the depositions?

**A. Yes. The summaries are consistent with what's in the depositions, and also the coworker depositions support the facts as stated in the plaintiff's deposition.**

Q. All right. Now, Doctor, assume that the evidence in this case -- and this is a month before trial, but assume that the evidence in this case supports the testimony that you have just read, that there was regular, routine use of making fabrication of gaskets, removal of gaskets, and that he worked around other products as well, and assume that the evidence is that the fabrication of these gaskets and the removal of these gaskets and the other products that he worked around all created visible dust as you have summarized.

What implications do those descriptions have to you as to what the -- as to whether or not those exposures would have contributed all or part to his mesothelioma?

**A. Well, I believe with the exposures like I had just described would have been attributable exposures; in other words, they would have contributed either in whole or in part to the development of this man's mesothelioma.**

Q. All right. Now, what conclusion, if any, can you reach as a physician when there is a

description of visible dust from asbestos-containing products?

**A. When there is a visible dust, that means you have a pretty high concentration of particles in that dust. Now, the older literature refers to dust concentrations having to be five million particles per cubic foot or greater before you could see visible dust in very favorable lighting conditions.**

**My understanding is that five million dust particles per cubic foot is kind of an imprecise term because that includes not only asbestos fibers, but also plaster or mica or whatever type of binders are present in a dust-producing material.**

**But on the average -- you know, if you have to use a figure, five million particles per cubic foot is roughly equivalent to six fibers per cc. And that would be a pretty high dust level by itself.**

**So if you see a visible dust, you**

* * *

**or anything of that sort, that they do have the potential to be released and, therefore, respirable.**

Q. And did you review the various levels of asbestos exposure that these different reports showed to determine whether or not the exposure

from these different reports showed the potential to release exposure above background levels?

**A. Yes, the fiber release that a lot of these documents showed was up to three fibers per cc, which is certainly high enough to contribute to the development of mesothelioma. That's certainly far above the permissible exposure concentrations that are now in place.**

Q. You're not an industrial hygienist, correct?

**A. That's correct, I'm not an industrial hygienist.**

Q. And you didn't attempt to analyze the various studies from an industrial hygiene point of view; is that correct?

**A. That's correct. As a physician, I noted that they either showed or showed the potential for fiber release. That's what I need to know to help in the causation statements after a diagnosis of malignant mesothelioma.**

Q. Okay. And were you provided summaries of these studies as well?

**A. Yes, sir. I've got an extract of those studies.**

Q. Now, from the summaries that were provided -- assuming there's expert testimony that these summaries are correct -- would the summaries

that were provided to you -- did they add to any understanding that you may have concerning the role of gaskets and packing in the release of asbestos fibers?

**A. Well, yes, sir. They show release that is above ambient air, above regulated limits, and in some instances exposure levels that are extremely high during work with gaskets.**

Q. All right. Specifically the reports by Dr. Longo, can you identify these reports as reports that you have previously seen?

**A. Yes, sir. There's two main books, I believe. One is a fabrication study, one is the removal studies.**

Q. And did you review both of those?

**A. Yes, sir.**

Q. And did the -- the levels of potential asbestos exposure release as demonstrated in those studies what, if any, conclusions -- have medical significance to this case?

**A. Well, both of these studies show fiber concentrations during the work being done that are plenty high enough to give respirable asbestos fibers that contribute to the development of mesothelioma. These are levels that are above ambient air, these are levels that are above any conceivable**

**background, and levels that are above the regulated limits.**

Q. Okay. You mentioned some photographs that you have seen. Let me show you these photographs.

Are these photographs the ones that you are referring to?

**A. Yeah, these are some of the photographs that are contained within the Longo fabrication report, I believe. And they show wavy, curly little fibers of the short that you would expect to see with chrysotile asbestos.**

Q. Can you hold that up just to --

**A. Sure.**

Q. All right. Dr. Longo explained to us those photographs, but did that have medical significance to you, those photographs of the surface of gaskets?

**A. Well, this is a lower-power photograph taken with a scanning electron microscope, similar, I suppose, to the scanning electron microscope that I operated for about 15 years, and it shows patches where the individual fibers shine through, so to speak.**

**This area is seen in a higher magnification picture here. And when you look at that patch you see that there's fibers**

**just sticking out into the air. To me, this indicates a potential for release -- for fiber release and, therefore, the potential for this to be respirable asbestos fiber.**

Q. All right. Doctor, did you also review a report – is one of the reports in there a report on valve packing that was done by Dr. Longo? Is that also in your book of reports?

**A. Yes, sir, that would be item two in this book.**

Q. Okay. Have you read and reviewed all of those various reports at one time or another?

**A. Yes, sir. I can't say that I've read every single word or page on them, but I have looked through all of these reports previously.**

Q. From all of those reports about gaskets and packing, were you able to form a conclusion with a reasonable degree of medical certainty as to whether or not gaskets and valve packing had the potential to release fibers that would have medical significance for the causation of mesothelioma?

**A. Well, I was able to determine by looking at the documents that both gaskets and packing do have the potential to release fibers into the air within the breathing zone of patients like Mr. Oney.**

Q. Assume that in this case there's evidence that the routine use of gaskets, both

fabricated gaskets and removal of gaskets, created visible gust.

What, if any, conclusions would you reach as to the medical significance of that information about these products?

**A. Well, given this type of information from the Longo studies, I would conclude that visible dust produced by Mr. Oney would have contained asbestos and he would have breathed that asbestos and it would have contributed to his mesothelioma.**

Q. Did you see in the depositions and the summaries of the depositions whether or not Mr. Oney identified any specific manufacturers of gaskets and packing?

**A. Well, he did state in his deposition that he was able to observe the names of several trade names on products that he's used. It was either printed on the outside or on the packaging that the material came in.**

Q. And what were some of those names?

MR. O'CONNELL: Objection; same reason.

THE WITNESS: Names that he mentioned in his deposition were John Crane sheet packing, Garlock sheet packing, John Crane, Garlock, Flexitalic, and Manville gaskets, John Crane Super Seal packing, Crane valves, Leslie

valves, Garlock sheet packing, John Crane SS-6AM, a type of square packing that came on a roll.

BY MR. HATTEN:

Q. Are the John Crane products that you previously mentioned -- are they included in the testing that Dr. Longo and Dr. Millette did sheet -- I mean, the gasket material?

**A. Certainly materials with those same trade names are used in the Longo and Millette studies.**

Q. All right. Doctor, on the basis of -- did I provide you with the actual transcripts of the witnesses as well as the summaries?

**A. Oh, yes, sir; I have those right here.**

Q. And did you have an opportunity to review the actual transcripts as well as the summaries of Mr. Oney and the witnesses?

**A. Yes, I looked through them. I looked through Oney's a bit more detailed than I looked through the coworkers. But with all of them I looked at them and checked some of the references back to the full transcript.**

Q. All right. On the basis of the testimony that you've read, the testing of gaskets and packing as revealed in your book there and the testing by Dr. Longo of the John Crane gaskets and valve packing, have you reached a conclusion that you can express with a reasonable degree of medical certainty

concerning whether or not the exposures to John Crane gaskets and packing as described in the testimony and the reports was a substantial, contributing cause to Mr. Oney's mesothelioma?

**A. Well, yes, I have reached a conclusion, and that conclusion is that that would have been one of the attributable exposures that Mr. Oney had at the shipyard; that is to say, that exposure as you've just described it was a substantial and significant contributing cause of the development of his mesothelioma.**

Q. All right. Now, you've read in the depositions that he was exposed to other products as well; is that correct?

**A. Yes, sir.**

Q. Did you read in the depositions and the testimony that Mr. Oney was exposed to other products?

**A. Yes, sir, I did.**

Q. Do you have an opinion as to whether or not the other asbestos products that he was exposed to onboard ships at the Newport News Shipyard were also substantial, contributing causes to his developing mesothelioma?

**A. Well, yes, as a general statement to the extent he breathed in asbestos fibers from all of the products that he worked with at the shipyard, all of those exposures were**

**significant and substantial, contributing causes to the development of his malignant mesothelioma.**

Q. All right. If he had not had one exposure or another exposure -- whatever exposure you want to pick at the shipyard -- what influence would it have, if any, if you took part of the exposure that he had away from your causation analysis?

**A. Well, mesothelioma is an indivisible disease; you don't have part of the mesothelioma caused by one exposure and another part caused by another exposure.**

**However, to answer that in a hypothetical fashion, if he had had only, let's say, 50 percent of the exposure that he actually did have, he still might have developed a mesothelioma, but the chances of him doing that would have been less.**

**If he had developed mesothelioma, odds are that he would have developed it at a later time. It would not have necessarily been this mesothelioma -- could have been a morphological and entirely different mesothelioma, but those are the chances. The chances would have been less and the chances would have been for it to be later.**

Q. You brought with you today a container of marbles. And just to illustrate the point you've just made, can you explain to the jury how all of the various exposures that one receives may play a role in causing mesothelioma?

**A. Sure. Well, this is a famous experiment -- famous illustration that we've used for years and years and years. And what it refers to is a jar representing the human body that's partially filled with water. Now, we've left out the water just for the purposes of simplicity and we didn't want to make a big mess right here on the conference table, but when the water overflows is when an individual develops malignant mesothelioma. We start with a certain given level of water. You start adding asbestos fibers to it. Some asbestos fibers add very little. Chrysotile fibers, for example, have a fairly low carcinogenic potential by themselves. Amphibole fibers have a greater carcinogenic potential on a fiber-by-fiber basis, so those are bigger balls to go in here. So we add more chrysotile. We have an exposure to -- a bigger exposure to a chrysotile-containing product, or maybe we have an exposure to a mixed asbestos-containing product, and the exposures add up and build up over a period of time, and eventually we have enough asbestos in the jar that the water overflows and the individual develops mesothelioma.**

**Well, the purposes of this analogy is to show you that it's not just one fiber, like the last fiber, or the first fiber that causes the mesothelioma, but it's all of the fibers that the person has been exposed to that contribute to this jar overflowing.**

Q. Doctor, earlier you talked about the fact that chrysotile fibers may disappear from the lung over time. And so if that's the amount of asbestos that may be in the lung at the time that the cancer starts, that the mesothelioma starts, can you illustrate what the effect of the half-life of chrysotile would be in comparing how much asbestos is there when the cancer starts versus how much would be there at autopsy?

**A. During the time interval from the development of the disease until a piece of lung tissue is gotten either at autopsy or at surgery, you're going to have a lot of clearance of the chrysotile going on, but the amphibole fibers are likely to still remain in place because their clearance half-life is anywhere from 20 or 30 up to over a hundred times slower than the chrysotile.**

**So if you clear most of the chrysotile from the lung, you might still be left with a little bit, but the relative proportion of the amphibole fiber will be a lot greater.**

Q. Okay. Doctor, do you have an opinion with a reasonable degree of medical certainty as to whether or not all of the various asbestos exposures that Mr. Oney received at the shipyard while working onboard ship, including gaskets, packing, pipe covering, other products — do you have an opinion with a reasonable degree of medical certainty as to whether or not all of those exposures contributed to cause his mesothelioma?

**A. Yes, sir, I do. It is my opinion that all of those exposures to asbestos contributed to the development of his mesothelioma.**

Q. And to the extent that the evidence shows that Mr. Oney was exposed to gaskets and packing from removing gaskets, fabricating gaskets, do you have an opinion with a reasonable degree of medical certainty as to whether or not those exposures would have been a substantial and contributing cause to his mesothelioma?

**A. Yes, sir. Those particular exposures would have been a substantial and significant and contributing cause to the development of his mesothelioma.**

Q. If the gaskets were manufactured by John Crane or if the gaskets were manufactured by Garlock or if the gaskets were manufactured by Johns-Manville, would it make any difference as to whether it was a substantial and contributing cause?

**A. No, as long as those-were asbestos-containing gaskets that released fibers that he breathed, then his body would not be able to tell where the asbestos came from, and they would all contribute to the development of his mesothelioma.**

Q. Doctor, are you aware of any air sampling

* * *

**either Modern Pathology or Human Pathology, January 1st, page 1 through 20 or something like that.**

Q. Okay. Another stain done was CK5/6, correct?

**A. Yes, sir.**

Q. That was negative?

**A. Yes, sir. Again, CK5/6 is positive in fewer than 50 percent of sarcomatoid mesotheliomas.**

Q. Okay. In your opinion, Doctor, this is a sarcomatous mesothelioma, correct?

**A. Yes, sir, that's correct. That would be on the basis of the histologic pattern, the admixture of collagen with it and copositivity of pan-keratin, vimentin**.

Q. Tell me if you disagree with this statement, that each exposure to asbestos contributes to the risk of mesothelioma but not necessarily to the causation of mesothelioma.

**A. Well, in general I think that exposures would contribute to both. Conceivably it can be circumstances -- there could be circumstances where it's within the -- the latency period is too short or some other extenuating circumstances that it could conceivably not contribute to the cause.**

**Generally, I would disagree with the statement because I think it would contribute to both.**

Q. You talked about the carcinogenicity on both direct and cross now of the different asbestos fibers with regard to mesothelioma.

I believe it's your testimony that in terms of if you're going to rank the fibers in terms of their potency --

**A. Yes, sir.**

Q. -- that the amosite is about 30 times greater than that of chrysotile?

**A. Yes, sir. The medical literature contains a variety of different estimates, but that would be the one that I'd subscribe to.**

Q. For crocidolite, it's 50 times greater than chrysotile?

**A. About that.**

Q. You say the medical literature is all over the place. There's literature that goes up to as high as a thousand times to one with regard to crocidolite versus chrysotile, correct?

**A. Well, 800 to one, at least. There's some that says two to one or four to one on the other extreme, but I personally would choose something in the middle.**

Q. Let me ask you this question: Do you believe that the following two statements are equal: One, there's no safe level of exposure to asbestos; two, there's no known safe level of exposure to asbestos all when it comes down to mesothelioma?

**A. Well, in the context of mesothelioma, I think that you probably got equivalent statements there.**

Q. Okay.

**A. I mean, I could even conceive of situations in which -- if you took an 85-year-old man and sent him in to do something that's going to involve an asbestos exposure, it's probably more likely that he'll die of something else before he has the long enough latency period. I mean, I can think of extreme examples that might fall outside of the illustration that you just made, but in general terms I think that is a correct statement.**

Q. All this material given to you by Mr. Hatten, the gasket studies, the packing studies, the Longo tests, in coming to your opinions in this case as to whether or not asbestos-containing products at the shipyard were a cause of Mr. Oney's mesothelioma, you didn't need to rely on that at all, did you?

**A. Well, quite frankly, Mr. Oney's case is**

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VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF NEWPORT NEWS

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|---|---|---|
| SANDRA KAY ONEY, Executor Of the Estate of SHARON VAUGHN ONEY, Deceased, Plaintiff, | ) | AT LAW NO. 00301TF |
| v. | ) | |
| JOHN CRANE, INC., Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
DAY 3
March 28, 2007

BEFORE:

THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

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**shipyard. Not only one time; this is continuously. Packing, things in the material shack. Stays on a big old roll. And when the**

**guys use it, they come and get it and cut it off and leave. They might use it on the top of my desk in the shipyard. Wherever is a flat surface.**

Q. Where was this material maintained at the shipyard?

**A. In the material shack.**

Q. And did you have occasion to go to the material shack to see it there?

**A. Continuously, yeah.**

Q. And if that's true -- turn it around so the camera can see it.

**A. It's the Crane packing.**

Q. All right. Is that a product that you used in the shipyard?

**A. Continuously.**

Q. And what purpose did you use this product?

**A. We -- well, that's a sheet packing, too, and we used -- (inaudible) --**

Q. Did you use this for the same purposes as the Garlock you've previously mentioned?

**A. Uh-huh, right.**

Q. And was there any times when you'd use John Crane as opposed to Garlock or vice versa?

**A. Sure, yeah.**

Q. And when would you determine which -- were they interchangeable or did you use them -- just whatever you had?

**A. We used this one, whatever we had, or -- you know.**

Q. And I'm going to hand you what has been marked as Exhibit Number 7 and I'm going to ask you if you recognize that as something that you worked with in the shipyard --

**A. Square packing we had on the flanges.**

Q. Let's turn it around and let's explain to the jury what we're looking at. What is it? Square packing, tell me what you did with square packing. What did you do with square packing?

**A. Put it in the flanges.**

Q. And how often would you use this product?

**A. Daily. Daily. The flange has -- the steam belt has it. You have to make -- you have to cut it to suit. It's a square flange. It comes in round or square and you have to cut it to suit.**

Q. And do you recognize the name that's shown --

**A. Yeah, Garlock.**

Q. Was there any particular ships you used this on?

**A. Continuously, all of them.**

Q. And how often would you be using it?

**A. Every day.**

Q. All right.

UNIDENTIFIED SPEAKER: We'd ask that this be introduced as Exhibit 7.

BY AN UNIDENTIFIED SPEAKER:

Q. I'm going to hand you a document that's been marked as Exhibit 8 and ask you if you recognize this product as having been in the shipyard, and if so we'll turn it around.

**A. That's basically the same stuff. It comes in a roll, square packing.**

Q. And who is the manufacturer of that, if you know?

**A. I don't see -- it's John Crane packing.**

Q. Did you use this packing in a similar fashion that you did with the last one we just looked at?

**A. Very similar, yeah.**

Q. And were they used interchangeably, whatever you had?

* * *

**everything was fine in the (inaudible).**

Q. And did you breathe what was falling around in the air?

**A. (Inaudible).**

Q. Now, was this sheet packing that we previously referred to used by anybody else other than you on these ships that you were working?

**A. 42 used a lot of it.**

Q. And were -- how close would you be as of routine matter to them?

**A. (Inaudible) you know.**

Q. And were you ever around 42 people who were using these Garlock --

**A. Every day. Every day.**

Q. And were you around the 42 people when they were using the John Crane packing?

**A. Sure. We all work together. Tight space; we all work together.**

UNIDENTIFIED SPEAKER: Objection.

BY AN UNIDENTIFIED SPEAKER:

Q. And were there other machinists working around you that were using this sheet packing material?

**A. I'm sure there were.**

Q. Do you have any recollection of working

* * *

that you remember that you used?

**A. I remember three names, sir: Johns-Manvilie, John Crane, and Garlock. That's like the three names that -- when you talk asbestos, that's what I remember.**

Q. Let me show you an exhibit. Can you identify this for the jury?

**A. Yes. That's a type of gasket we would use to make these joints up, these couplings up.**

Q. And who manufactured that type of gasket?

**A. John Crane and the other two I mentioned.**

Q. And how frequently were people making gaskets around the catapult like that?

**A. You asking me -- roughly every day I see people making gaskets.**

Q. Now, can you describe to the jury how you go about making a gasket like that?

**A. I can explain that. We would take a sheet, but not like this, and we would put it on the flange that you just saw and we'd take a ball-peen hammer and cut along the edges. And this would be placed over the holes — you saw four holes, but this is an eight-hole, and so we'd take the ball-peen hammer and knock the holes out of the gasket, knock the insides and the round and the holes out.**

* * *

**A. Yes.**

Q. And they would --

**A. Not always.**

Q. But they would either make the gasket or get a precut gasket to go between the pipes, correct?

**A. Yes, sir.**

Q. And when it was -- and when it was valves and hooking up pumps to flanges, the machine --

**A. The machinery --**

Q. The equipment?

**A. Yes, sir. We did a hundred percent of that. We also did make some -- we did some of the pipe -- not to install the pipe, but we installed the gaskets. 42, which is X-42 pipefitters, ran all the pipe.**

Q. Okay. And would they use the same materials that you said you used --

**A. Looks the same to me, sir.**

Q. -- the John Crane and the Garlock and the Johns-Manville?

**A. That's the three that I remember.**

Q. And how is it that you remember those three?

**A. They had the names on them.**

Q. And for instance, on this, the name Crane packing and John Crane is on the sheet?

**A. Yeah, it's stamped on them I guess or painted on them. It looks like that.**

Q. All right. And if it was Garlock, it would have the name Garlock on it?

**A. Yes, sir.**

Q. And if it was Johns-Manville, it would have that?

**A. Yes, sir.**

Q. Now, on the overhaul of ships, what is it that the machinist would have to do when they come in to overhaul the catapult that would relate to flanges, pumps, and valves?

**A. Okay. We would disconnect all the pumps, send them to the shop to be overhauled. In the loss valve room, we would take the exhaust valve, the slide foot assembly, and have it set and have it overhauled and reinstalled it.**

Q. So all the various valves and the valve room would be disconnected, the pumps would be disconnected, and so are we talking about hundreds of flanges and you'd have to disconnect each one?

**A. Yes, sir, drain all the fluids.**

Q. All right. Now, how many catapults were there on an aircraft carrier?

* * *

Q. Do you remember the names of any?

**A. Yes, sir.**

Q. And what were they?

**A. Manville and Garlock.**

Q. So all three made packing that you used?

**A. Yes.**

Q. Now, the John Crane packing that you used was a graphite packing, was it not?

**A. The John Crane packing I used looked just like that.**

MR. HATTEN: Are you referring to valve packing or sheet packing?

MR. WALLACE: Excuse me. I object to Mr. Hatten coaching his witness and talking.

MR. HATTEN: I object to the question because I don't know --

THE COURT: He's trying -- there is a question about packing.

MR. WALLACE: All I'm asking about is packing.

THE COURT: It applies to either the sheet or the valve.

THE WITNESS: Yes, sir.

MR. WALLACE: I have to object to Mr. Hatten coaching his witness. If he wants to go

* * *

**the most.**

Q. Do you recall being asked that question before, which was the most popular one?

**A. No, I don't recall that one. Like I said, before, I remember the three kinds real -- it's coming to mind, the three, Manville, Garlock, and Crane.**

Q. This is page 22 of your deposition of December 6, 2006, question: Do you remember any of the kinds of gaskets, specifically that you were using any of the manufacturers?

Answer: I remember a few names of the gasket material. One was Garlock; that seemed like that was the most popular one, and I think another one was Johns-Manville; that was asbestos gasket material.

Do you remember that question and answer?

**A. I recollect something like that. I mean, if it was in my deposition, I said it.**

Q. A question -- I know I'm sort of moving around, but things come at me in different ways.

The pipefitters in putting pipes together or hanging the pipes or putting them in, the pipefitters, they put each piece together or were they welded together?

**A. The flanges are welded on the pipe, but the joint is the end of the flange where you put --**

* * *

Q. All right. And do you recognize --

**A. John Crane.**

Q. -- John Crane packing?

**A. Yes.**

Q. John Crane sheet packing?

**A. Definitely.**

Q. All right. And is that one of the types of asbestos sheet packing that you saw when you were a helper?

**A. Yes.**

Q. That the mechanic would be using.

And do you remember any other types of sheet packing that the mechanics would be using as they made gaskets around you?

**A. Garlock.**

Q. All right. Anyone else?

**A. We had some Johns-Manville.**

Q. All right. Now, when you would take the gaskets apart, when you would have repair work -- did you work on repair work as a helper?

**A. As a helper, yes.**

Q. In that period, the first few years?

**A. Yes.**

Q. And did you see gaskets removed?

**A. Yes.**

Q. And did you become familiar with the work methods and processes for that?

**A. Yes.**

Q. All right. Let me ask you — are these the tools that you described, Exhibit Number 5, a scraper?

**A. Yes.**

Q. Does that look like the scrapers that you would use?

**A. Yes.**

Q. Exhibit Number 6, does that look like the wire brushes that you would use?

**A. Yes.**

Q. And Exhibit Number 7, is that the type of soft wire pneumatic tool that you would use?

**A. Yes.**

Q. All right. Now, have you seen any videos by Dr. Longo making gaskets in any way

similar to what you did at the shipyard -- or saw people do at the shipyard?

**A. Yes.**

Q. All right. And did that video -- was the methods and the way they made gaskets in that video -- how similar was that to what you saw workers in the machinery department use at the shipyard?

**A. I would say it was identical to the way we basically did our work.**

Q. All right. And here we have Exhibit Number 8, which is a number of photographs showing from that film.

Do those photographs accurately reflect the standard methodology for making gaskets that you saw the X 43 machinists using?

**A. Yes, and it was also the way I just explained it.**

Q. All right. And the next one is removal of gaskets. Do these photographs in Exhibit Number 9 -- do they accurately reflect what the work processes and appearance of removing asbestos gasket was at the shipyard?

**A. Yes.**

Q. And that's something that you personally did as well?

**A. Oh, yes.**

Q. All right. Now, how did you know that the gasket material was made by either John Crane or by Garlock?

**A. It was marked on the boxes and the way it came -- delivered.**

Q. Did the sheet itself have the name on it?

**A. Yes.**

Q. All right. Did the Garlock gasket have its name on it as well?

**A. Yes.**

Q. Let me show you a sheet of Garlock.

Does this look like the Garlock material that you worked with?

**A. Yes.**

Q. All right.

MR. HATTEN: We'll mark that as the next exhibit.

THE COURT: 17. Any objection?

MR. WALLACE: I didn't see it, Your Honor. I doubt I will, but I just didn't see it.

(There was a pause in the proceedings.)

MR. WALLACE: No, of course not.

*THE COURT*: All right. It will be marked and admitted as Plaintiff's Exhibit 17.

(The exhibit was admitted into evidence.)

BY MR. HATTEN:

Q. All right. Were these products used interchangeably at the shipyard, the Garlock and the John Crane gasket material?

**A. Yes.**

Q. All right. And does this have the

* * *

Q. The name was on the box?

**A. Yes.**

Q. All right. And the name was on the reel?

**A. Yes.**

Q. And if it was Garlock, would that name also be on the box or the reel?

**A. Yes.**

Q. All right. Did you also use Garlock valve packing or --

**A. Yes, Garlock sometimes, too.**

Q. All right. And when you would remove the valve packing what type of tool would you use?

**A. There's a -- I don't know how to describe that thing -- a puller, like, with a twisted end on it.**

Q. I show you Exhibit Number 15. Does that have the same appearance as the valve packing removal tool that you would use?

**A. Oh, yes, sir.**

Q. All right. Now, when you were working as a machinist, before you became a materialman, my understanding is you did not know and did not work with Mr. Oney. Is that correct?

**A. That's right.**

Q. When did you first meet Mr. Oney?

* * *

or federal, ever rejected any portion of your testimony concerning causation in a mesothelioma case?

**A. No, sir.**

Q. Let me begin with the cause of mesothelioma.

Is there a known cause of mesothelioma that is generally accepted in the medical community?

**A. Yes, sir, there is.**

Q. And what is it?

**A. Asbestos.**

Q. Is there any other proven occupational exposure to any other substance that causes mesothelioma that is accepted in the general medical community?

**A. Well, there are a handful of cases where mesothelioma has been linked to a type of radioactive contrast material called thoratrast. It's not an industrial use, it's a medical use, and by handful of cases I'm talking about probably 2 or 3 in the pleural space and 2 or 3 in the peritoneal space. Nonetheless, these are considered to be bona fide cases -- bona fide associations.**

**There are cases of individuals from Turkey or Greece who have been exposed to a similar type of fiber that's call erionite. Possibly some of that was used on an occupational basis in digging or using a whitewash to paint a house. But in the United States the only known industrial occupational cause of mesothelioma is asbestos exposure.**

**There have been some investigations of people who had external beam radiation therapy, but that literature has not seemed to be mature enough to prove that association.**

**There have been suggestions that people with SV40 virus that they've received as a contaminant of inoculations that they've had in the past -- but, again, that information has not been mature enough to say for sure that it was a cause of their mesothelioma.**

**So, again, we -- we're left with asbestos as the single prevalent cause of mesothelioma in the United States.**

Q. In approximately how many cases are they able to identify known asbestos exposure history in people that have mesothelioma?

**A. Again, in the United States the medical literature uses figures of 10 percent -- excuse me -- 90 percent where asbestos is the cause, maybe 10 percent where the cause is unknown, idiopathic.**

**Some literature will say as many as 20 or even 30 percent of meso's are idiopathic. But, again, idiopathic simply means unknown. It doesn't mean that it's not asbestos, it means that it's unknown. There are some cases where persons are probably unaware of asbestos exposures that they have had that would be lumped into the idiopathic category.**

**As a general figure that I prefer to use, I would say that 90 percent of mesotheliomas are related to asbestos exposure and approximately 10 percent are unknown.**

Q. If you have a patient with mesothelioma who has a known occupational history of asbestos exposure, is that sufficient for you to make a determination of whether or not the mesothelioma is caused by asbestos exposure?

**A. Yes, sir, if the individual has a known occupational exposure to asbestos then that would suffice under the Helsinki criteria as an asbestos-related mesothelioma.**

Q. What is the Helsinki criteria?

**A. The Helsinki criteria are criteria that were drawn up at a consensus conference. The consensus conference was held in Helsinki, Finland, in 1997; hence the reference to it as the Helsinki criteria.**

* * *

**much to it. I considered his presentation with signs and symptoms of the mesothelioma.**

Q. What was that? What were the signs and symptoms of the disease that he presented with?

**A. Well, he presented with a left pleural effusion. He originally presented with it in 2004. It was tapped --**

Q. When you say it was tapped, what does that mean?

**A. Well, that means that he underwent a procedure called thoracentesis, where the**

**physician inserted a needle between his ribs and drained off, in this case, 700 milliliters of bloody fluid. That's about -- equivalent to about three quarts of -- excuse me. 700 would be about 7/10 of a liter. So a liter is about one quart, so about 7/10 of a quart of bloody fluid. Cytology on that fluid showed a lymphocytic effusion where malignant cells were not immediately obvious; they were not detected.**

**Then, after that procedure he underwent a procedure called a thoracotomy, where they opened his chest partially and decorticated or stripped tumor off of his lungs so that his lung could reexpand. The lung was covered by tumor tissue.**

**Then that procedure returned a diagnosis of chronic pleuritis. In other words, in retrospect it is very suggestive that some of that could have been tumor tissue, but it did not meet standard histologic criteria for the diagnosis of mesothelioma at that time.**

**At any rate, postoperatively he continued to have signs and symptoms that included shortness of breath and discomfort in his left anterior chest. A pleural effusion reaccumulated, so that was once again studied with PET scans which showed multiple areas of positive uptake on the PET scan, a type of finding that indicates that there's additional tumor or scarring or some active process going on in the chest.**

**So on January the 27th of 2006 he had a left thoracotomy with biopsies of the pleura and excision of the left anterior chest wall. This time the pathology did show a sarcomatoid mesothelioma with the appropriate special stains that were done, tissue was sent to Drs. Dodd and Sporn at Duke University Medical Center, and they confirmed the diagnosis of malignant mesothelioma, and they also evaluated other possible types of tumors. Their evaluation for other possible tumors was negative, and that ends my narrative of the patient's clinical history.**

Q. All right.

**A. What I did after that was I reviewed the pathology material that I had been sent.**

Q. And what conclusions or methodology did you use to reach a conclusion?

**A. Well, I examined pleural biopsies from 2004 and pleural biopsies from 2006. I -- the type of examination that I did on this material was essentially the same that I would do on a hospitalized patient at Riverside Hospital.**

**I examined the routine slides to look at the tumor architecture, the general appearance of the tumor cells, and then I looked at the various special stains that had**

**been done on both biopsies to see what the staining reactions were. And what I determined from that was that the staining reaction was perfectly consistent with a sarcomatoid malignant mesothelioma.**

Q. What is calcified pleural plaques?

**A. Calcified pleural plaques are markers of asbestos exposure. Unless a patient lives in an area where there's endemic asbestos in the soil or other types of fibers that will cause asbestos in the soil, like in Turkey or Greece or parts of China, most all pleural plaques are a very strongly associated marker of occupational asbestos exposure.**

**The fact that some plaques calcify and**

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF NEWPORT NEWS

| | | |
|---|---|---|
| SANDRA KAY ONEY, Executor | ) | |
| Of the Estate of SHARON | ) | |
| VAUGHN ONEY, Deceased, | ) | AT LAW NO. |
| Plaintiff, | ) | 00301TF |
| v. | ) | |
| | ) | |
| JOHN CRANE, INC., | ) | |
| Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
DAY 2
March 27, 2007

BEFORE:

THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

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* * *

**A. Well, I'm taking medications, but I think I can make it.**

Q. All right. Can you think of any reason why we shouldn't go forward here today?

**A. No.**

Q. Can you tell me your date of birth?

**A. January the 12th, 1941.**

Q. And your address?

**A. 202 Dawson Drive, Seaford, Virginia.**

Q. Mr. Oney, we just got your address. Can you tell me who lives with you at that address?

**A. My wife, Kay.**

Q. And how long have you and Kay been married?

**A. 46 years.**

Q. And it's my understanding, sir, from answers to interrogatories that there are no children of that marriage. Is that correct?

**A. That's correct.**

Q. And that you have no dependents other than your wife. Is that fair?

**A. That's correct.**

Q. How long have you lived at the Dawson Drive address?

**A. 27 years.**

* * *

**A. Last two months.**

Q. Have you gone through any different type of treatment regimen?

**A. In the last two months?**

Q. Yes, sir.

**A. Yes.**

Q. And what has that been?

**A. Chemo and radiation.**

Q. And was that your first course of chemo and radiation?

**A. Right.**

Q. Mr. Oney, are your parents still alive?

**A. No.**

Q. Can you tell me your father's age at his death?

**A. 76.**

Q. Mr. Oney, what did your father do for a living?

**A. A farmer.**

Q. And what did you-all raise on the farm?

**A. Livestock and tobacco.**

MR. HATTEN: This is a defense attorney. I just wanted to clarify that's who's taking this deposition.

THE COURT: Yes, sir.

* * *

**course**.

Q. And would you have finished vocational school roughly 1961?

**A. Yeah.**

Q. When you left vocational school where did you go?

**A. After vocational school I went to Newport News Shipbuilding**.

Q. What year did you come to the shipyard?

**A. 1962.**

Q. 1962. So you came to the Newport News area in 1962 and went to work in the shipyard, correct?

**A. Yes, sir.**

Q. When you first got to the shipyard did they assign you to a job?

**A. Well, yes, I worked in the machine shop.**

Q. All right. What were you making in the machine shop?

**A. The shop makes all different things. That particular job was the turbine -- one of the turbine -- a water turbine that was up in the mountains somewhere. It was a water turbine at the time. It didn't have nothing to do with the ships.**

Q. And that was the first job you had when you got there?

**A. But that was like a month.**

Q. All right.

**A. Then I had different jobs at the shop, you know, miscellaneous shop work.**

Q. How long were you in the machine shop at 35th Street?

**A. They got slack and they said I had to get laid off or get transferred, so I got transferred to the MI department, 43.**

Q. And when was that that you --

**A. Oh, about eight months.**

Q. Still in 1962?

**A. It was probably -- yes. I didn't stay there long.**

Q. And you said the MI department?

**A. Right.**

Q. Machinery installation?

**A. Been there ever since.**

Q. And when did you leave?

**A. Leave the shipyard?**

Q. Yes, sir. You said you were there ever since. You worked in the MI department --

**A. Oh, I retired in '94.**

Q. Your entire career other than the roughly eight months that you were in the machine department was in the MI department?

**A. Right.**

Q. What's the numerical classification for the MI department? X what?

**A. X 43.**

Q. What did you go in -- what job classification did you go into the MI department in 1962?

**A. A sub machinist.**

Q. So you went in as an outside machinist helper?

**A. And I worked my way up to first class helper, second class, third class, then I went up to handyman, stepped up to handyman and then to mechanic.**

Q. Yes, sir. And each of those classes had three steps, first, second, third; first, second, third, correct?

**A. Yeah.**

Q. And at the end, what was your classification when you retired?

**A. I was a supervisor.**

Q. Supervisor. And you did do each of the three steps in each grade, correct, first class, second, third class?

**A. Yeah, I went through all the steps, all the steps.**

Q. So, using roughly --

**A. Sometimes I made like supervisor in four years.**

Q. All right. So, you went through helper, handyman, and machinist in four years?

**A. Something like that. It wasn't very long. I went from '62 to '68 -- no, wait a minute. I made supervisor in '72. Ten years.**

Q. Okay. That's fair. So backing up, you went from helper to handyman to machinist in a ten-year- period.

**A. Right.**

Q. All right. Let's talk about your time as a helper, Mr. Oney.

**A. Okay.**

Q. Where were you first assigned as a helper? I know you were in the MI department, but --

**A. Main machine shop.**

Q. Main machine shop, and where was that located?

**A. That was at Washington Avenue.**

Q. Was it the same machine shop you came out of as a --

**A. Right.**

Q. And what were you doing?

**A. I was working on the turbines, the water turbines.**

Q. Were you doing the same job, just in a different department when you went in as a helper in the MI department?

**A. Yep.**

Q. All right.

**A. They had to have me available on the floor. That's the job you get.**

Q. Especially as a helper?

**A. As a helper you go where they need you.**

Q. As a helper were you working with either a handyman or a machinist?

**A. Was I working with?**

Q. Yes, sir.

**A. I was working with a mechanic.**

Q. A mechanic. All right. You started in the main machine shop at Washington Street both as -- when you first went to the yard and then when you transferred to the X 43.

**A. Right.**

Q. How long did you stay at the main machine shop in X 43?

**A. Just a few months.**

Q. A few.months?

**A. Yes.**

Q. All right. And then from there you went into subs?

**A. It was less than a year at the subs.**

Q. Okay. Less than a year at the subs?

**A. And the rest of the time was on the aircraft carrier, just about all the time.**

Q. From the time you were in X 43 until the time you retired?

**A. Well, there was some short period of time when I was on repair work, a short period of time, like a few months, or maybe weeks on different of these ships. When they come in if they need somebody we'd go over there and get the job done and go back to our regular job.**

Q. And that job maybe might be a day or two at a time?

**A. That's right, because you never no how long you're going to stay there.**

Q. Were there times when you left the machine shop that you went back to the machine shop?

**A. No, when I left I didn't go back.**

Q. All right. About what year, sir, did you go back to the subs?

**A. It was eight months after I went in the shipyard.**

Q. Eight months after you went into the yard or eight months after you went to X 43?

**A. After I went in the shipyard, what, in '62.**

Q. You went in in '62 to --

**A. About eight months to a year.**

Q. So somewhere late '62, early '63?

**A. Yes.**

Q. All right. Do you know the name of the subs you worked on?

**A. The VON STEUBEN and the SHARK.**

Q. And you gave me the name the VON STEUBEN and the SHARK?

**A. Right.**

Q. And I think I asked you if those were both being constructed in the yard at the same time.

**A. That was new construction.**

Q. Were they both being constructed in the yard at the same time?

**A. Yes.**

Q. Did you work on one and then move to the other, or was it back and forth?

**A. Back and forth.**

Q. During your entire time in X 43 before becoming --

**A. X 43.**

Q. -- before becoming a supervisor you were in the submarine program about a year. Is that right?

**A. Yes.**

Q. Okay. That's a little different than what we just talked about. I want to make sure that that's accurate. We have talked that you left the machine shop, went into the subs, you were there about a year. Did you ever go back to be working on the subs other than maybe every once in a while doing a repair?

**A. I had to go back several times, yes.**

Q. To do repairs or actually to work in construction?

**A. Both.**

Q. All right. Let's go back, then, just to talk about the time you were on the VON STEUBEN and the SHARK.

Were you only in the torpedo room on both of those vessels?

**A. (The witness nodded head.)**

Q. Yes?

* * *

named John Crane packing, you said.

**A. Well, that was just one off the top of my head, yeah.**

Q. I'm not trying to be tricky, Mr. Oney, but there are differences in those questions. One was what you might have been exposed to, and the next question was what did you work with yourself with your own hands. Can you tell me any products that you worked with with your own hands that you believe --

**A. Sheet packing, John Crane packing.**

Q. Okay. Can you --

**A. And Garlock.**

Q. Garlock what, sir?

**A. Sort of like the packing.**

Q. Packing? When you say packing what do you mean?

**A. We would cut the -- we would use the sheet packing or we would cut it. We would use both types.**

Q. Can you describe what it looked like for me?

**A. Yeah. Your sheet packing is in a sheet so we take a ball peen hammer and cut it. And when we were doing that it was particles flying everywhere.**

Q. Where would you place the sheet packing?

* * *

**A. Right.**

Q. Was the mechanic doing that work?

**A. The mechanic would be calling the shots on that.**

Q. Would he be doing the work?

**A. No.**

Q. Would the helper be doing the work?

**A. Most of it, yes. It's back and forth. The mechanic would do the work if it's necessary.**

Q. This was all at the time new construction,' correct?

**A. New construction, yeah.**

Q. So you're putting in sheet packing in between flanges, boring out torpedo tubes. What else did you do?

**A. That's about it, for about an eight-month period there.**

Q. You told me there were other trades working around you.

**A. Right.**

Q. What other trades were working around you?

**A. Well, whatever. Pipefitters were putting up the pipes, and the electricians were running their cable, and the pipefitters would cover it.**

Q. Pipe coverers -- what were the pipe coverers covering?

**A. Well, anything that gets hot, like steam valves and stuff.**

Q. Were they covering --

**A. Steam --**

Q. Were they covering pipe?

**A. Pipe.**

Q. What would they cover the pipe with?

**A. I don't know. Whatever it was was floating in the air, and it was heavy.**

Q. What did it look like? Not the air but what they used to cover the pipe.

**A. It was white and flaky.**

Q. If I said the term half-rounds would that --

A. **Half-rounds, you're right.**

Q. And there were two pieces that would go around the pipe?

**A. And they would meet in the middle, right.**

Q. And would the pipe coverers cut that material?

**A. Sometimes they have to cut it, and sometimes it's already cut.**

Q. But, I mean, cut for length?

**A. Right.**

Q. How would they cut it?

**A. Saw.**

Q. Would they have done that in your presence?

**A. Absolutely.**

Q. What happened to the air when that was done, Mr. Vaughn -- Mr. Oney. I'm sorry.

**A. Do what?**

Q. What happened to the atmosphere or the air when the pipe coverers cut the pipe covering with the saw?

**A. (Inaudible)**

Q. Would it go into the air?

**A. Absolutely. You could see it. You could breathe it. It was (inaudible).**

Q. Now, you told me that when you were hammering out a gasket with a ball peen hammer it would create dust as well.

**A. It would have some fabric in the air.**

Q. Some fabric?

**A. Yeah. I guess it's fabric. It was heavy.**

Q. You mentioned Garlock sheet packing, and you said that you saw Garlock[T]s name all over it.

**A. Right.**

Q. Do you remember what color that sheet packing was?

**A. What color sheet packing it was? It was grayish.**

Q. Grayish? Do you remember any numbers on that packing?

**A. The one that had Garlock on it?**

Q. Yes, sir. Do you remember any numbers?

**A. No, I don't know any numbers.**

Q. Again, just to make sure that we're on the same page, we're talking about the time that you were on the VON STEUBEN and the SHARK, right? We're still together --

**A. When I was on the submarines, period, yeah.**

Q. All right. Did you personally work with any other products that you believe contained asbestos during that time period other than sheet packing or rope packing, as you called it, or square packing?

**A. Right.**

Q. Did you work with any others yourself?

**A. I'm sure I was around it. I'm sure of that, because I could see it when I walked through the spaces. (Inaudible) but that covered most of it right**

* * *

square?

**A. Well, it was both kinds. Some of it was round; some of it was square.**

Q. If I described to you clothesline, the old braided clothesline, do you know what I'm talking about? If I just -- do you know what braided clothesline looks like?

**A. Yeah.**

Q. Did the packing look like braided clothesline even though it was square or round?

**A. Yeah.**

Q. Was it braided like that?

**A. Some of it was. Some of it was; some of it wasn't.**

Q. There was some that was not braided?

**A. If I can recall, yes.**

Q. Do you know whether that product contained asbestos?

**A. I would think so, yes, but I wouldn't -- yes, I would.**

Q. You said you would think so. Why would you think so?

**A. Well, I wouldn't think so. I'd say yes. It wasn't no question in my mind it was.**

Q. At the time you used it, Mr. Oney, did you know that it contained asbestos?

**A. No.**

Q. The sheet packing material, do you know or believe that contained asbestos?

**A. No.**

Q. You mentioned Garlock and John Crane sheet packing. Do you know of any other manufacturers of sheet packing?

**A. Mansville, I think.**

Q. Mansville?

**A. It rings a bell.**

Q. Okay. Any others?

**A. John Crane, Mansville, and Garlock. I'm sure there were some more in there, but I just can't think.**

Q. Mr. Oney, did you ever work with any gaskets that were ring or metal-inserted gaskets?

**A. Yeah, Flexitallic gaskets.**

Q. So there's another one that we remember, right?

**A. Oh, yeah, there was Flexitallic.**

Q. Sure. Where would you use a Flexitallic gasket?

**A. In between the flanges.**

Q. Would you use a Flexitallic gasket -- I'm sorry?

**A. For heat.**

Q. For heat?

Would you use Flexitallic gaskets just to heat, or would you use them on specific valves, or what?

**A. I'd say for specific valves, yes, I would think so.**

Q. And did the plans or the drawings tell you when you'd use one?

**A. Yes, absolutely.**

Q. Now, we've talked about square or round valve packing or gland packing, and we've talked about sheet packing.

Have you thought about any other asbestos-containing products that you may have worked with when you were on the subs?

**A. Not that I recall. I'm sure there is. I'm not positive of any others that I recall.**

Q. We also talked about working around the pipe coverers and using the half-rounds.

Can you describe any other products that you might believe contained asbestos that you worked around during the time that you were on the subs?

**A. I'm sure there were, but I can't -- you know, I just -- I don't know. I don't -- I mean, I can't say.**

Q. Did the pipe coverers ever use any cloth on the pipe?

**A. Yes.**

Q. Did you see them use that?

**A. Oh, yes, absolutely.**

Q. Did you see them cut it?

**A. Oh, yeah.**

Q. Did you ever use any cloth?

**A. Oh, I would say never.**

Q. How about over the top of the cloth or over the top of the pipe covering? Did they ever use any --

**A. Glue.**

Q. -- glue?

**A. Yeah. That's what it stayed together with.**

Q. All right. How about any mud?

**A. Mud, yeah. That's the same color -- well, the mud is kind of gray, and the glue is more like white.**

Q. Would the pipe coverers mix the mud in your presence?

**A. Yes.**

Q. How would the mud come to the job site?

**A. In a powder form in a bag that we mixed with water.**

Q. You said, we mixed with water. Did you actually do that process?

**A. No, but it was in the space that I was in.**

Q. Yes, sir. Now, I've given you some other products that you may have worked around. Can you think of any others that you may have worked around during your time on the subs, the VON STEUBEN and the SHARK?

**A. Well, like I said, I'm sure there are more, but I can't recall it.**

Q. Mr. Oney, do you know the manufacturers of any of the pipe covering?

**A. Probably John Crane and -- I already said that.**

Q. We're talking about the pipe covering.

**A. Pipe covering. Oh.**

**(Pause.)**

**Not -- not really, but I wasn't a pipe coverer. I don't...**

Q. How about any of the cloth or the cement or the glue that you mentioned? Do you know the manufacturer --

**A. Well, we already said the cloth. Didn't we mention the cloth?**

Q. You mentioned it. Do you know the manufacturers of the cloth or the cement or the glue?

**A. No, I can't recall that.**

Q. You told me that the cement came in bags?

**A. I saw it come in. They had to mix it.**

Q. Do you remember any of the names on the bags?

**A. No.**

Q. When the pipe covering, the half-rounds, came to the job site --

**A. Yeah.**

Q. -- did they come that way, or did they come in boxes?

**A. They came half-round, most of it. I saw most of it being cut in half.**

Q. How did it show up at the job site, that way or --

**A. Well, it was boxes, and it would fly everywhere, you know.**

Q. Do you remember any of the names on any of the boxes?

**A. I can't remember any of them.**

Q. These were just basic pasteboard -- cardboard boxes?

**A. Yeah.**

Q. Have we described all the products that you may have worked with or around during the time that you can recall during your time on the subs?

**A. As far as I know, yes.**

Q. After you left the subs, the VON STEUBEN and the SHARK, where did you go?

**A. I went to the aircraft carrier.**

Q. Do you remember the name of the carrier?

**A. Yeah, it was the KENNEDY, JOHN F. KENNEDY.**

Q. All right. And do you remember approximately what year this was?

**A. Approximately the year that was was 19 and -- let me see. Somewhere around '63, '64.**

Q. All right, sir. And were you still a helper in the X 43 department?

**A. I don't -- I don't -- I don't think so. I think I might have went on up there a little bit.**

Q. Might have moved up to handyman at that point?

**A. It's all the same; you do the same work.**

Q. Just get paid more?

* * *

Q. Okay. What other function or job did you do aboard the JFK?

**A. We put the rails in, we drilled the rails off, we installed the power cylinders, we aligned the power cylinders covers to the trough, we installed the water brake system, the continuous liners.**

Q. And this is all on the No. 3 catapult?

**A. And all the hydraulic systems, we did all the flushing, cleaned it and test it. And the reflectors, we put all that in. (Inaudible) the jet blast reflectors --**

Q. Yes, sir.

**A. We put all that in.**

Q. All right. And that was you job on the No. 3 cat -- those are the functions, and some others, I'm sure, that you --

**A. That was on the (inaudible).**

Q. How long total were you aboard the KENNEDY doing that work?

**A. Until it went down the river, finished.**

Q. And how long was that?

**A. I'd have to look at my time. '63 -- I'd say about '66, '67.**

Q. So roughly 3 or 4 years?

**A. Roughly, yeah, until it was finished.**

Q. Okay. Let's go back to your KENNEDY time and maybe it will come to you, okay?

**A. Okay. I'm. trying to figure out which one was first --**

Q. Okay.

**A. -- the KENNEDY or the AMERICA. I might have them switched.**

Q. All right. I want to just focus on what we've been talking about for a while, the KENNEDY

work, which was the No. 3 catapult and all the functions that you did.

**A. That was the first carrier I worked on in the shipyard.**

Q. Okay.

**A. And that was in the '60s.**

Q. Okay. Let me do it this way, then, Mr. Oney:

What you described working on the No. 3 catapult, that was your first job --

**A. That was the first job when I went aboard that ship.**

Q. Whatever ship -- whichever carrier it may have been, that's what you did?

**A. No, no.**

Q. That's what you did aboard the AMERICA -- I mean, the KENNEDY?

**A. Ever which one of those ships was first.**

Q. That's what you did?

**A. Yeah.**

Q. All right.

**A. Well, not really. You're -- which ship did I work on first, the AMERICA or the KENNEDY? Can't you answer that?**

Q. Well, I'm not sure. It's the AMERICA.

**A. It was the AMERICA, okay. Not the KENNEDY, the AMERICA.**

Q. What I was trying to say to you, Mr. Oney, was no matter which ship it was first, what you did was what you described, which was working on the No. 3 catapult. Is that correct?

**A. Not first, not on all the ships, no. Just on that one ship.**

Q. The AMERICA?

**A. The AMERICA, right. That was No. 3 catapult on that first ship.**

Q. All right. And you were there for about 3 or 4 years doing that?

**A. Not on that same ship, not on the same job.**

Q. On the same ship.

**A. Okay.**

Q. Okay. Did you ever do a different job aboard the AMERICA during the time that you were there 3 or 4 years?

**A. A different job.**

Q. Other than --

**A. Nothing but the catapult work.**

Q. Nothing but the catapult work?

**A. That's right.**

Q. All on the flight deck?

**A. All on the flight deck and gallery deck, 03 level, 01 level and main deck.**

Q. Okay. When you were working on the gallery level that was to work above for the catapult?

**A. Underneath the flight deck. That's where all the valves -- when you look at an aircraft carrier you don't see nothing but a flight deck. You don't see what's underneath that thing.**

Q. Right, I understand.

Do you believe, Mr. Oney, that you were exposed to asbestos-containing products during your time aboard the AMERICA?

**A. The AMERICA?**

Q. Yes, sir, which is the first ship you went to after the subs.

**A. That's right, absolutely.**

Q. What products were you exposed to during your time aboard the AMERICA?

**A. Now, this is the AMERICA?**

Q. Which is the first ship you went to after the subs. I think we've established that.

**A. John Crane packing.**

Q. John Crane packing?

**A. And the -- whatever the -- John Crane and Johns-Manville.**

Q. Are you talking about sheet packing or square packing?

**A. Both.**

Q. Both. On what would you use sheet packing?

**A. Why would I use it?**

Q. What would you use it on?

**A. I would use it on the temporary service and the steam -- gasket material on the non-pressure valves.**

Q. Non-pressure valves?

**A. Yeah.**

Q. This is new construction work?

**A. Yeah.**

Q. So you were cutting and installing the

* * *

Q. And can you think of any other products that you believe contained asbestos that other trades were working with in the vicinity you were working or around you while you were aboard the AMERICA?

**A. No.**

Q. And you told us that you were aboard the AMERICA for 3 or 4 years. During that time did you ever leave that ship and go to other ships?

**A. 3 or 4 years. I probably did, yes.**

Q. Do you have a specific recollection of doing that such that you could tell me what ship you went on and what you were doing?

**A. Oh, that's back -- God, that's back in the '70s -- no, '60s.**

Q. After you left the AMERICA do you remember where you went?

**A. After the AMERICA I went to the JOHN F. KENNEDY.**

Q. Okay. Back there. Do you remember what you did aboard the KENNEDY?

**A. Same old thing.**

Q. Working on the catapults?

**A. Yeah, catapult. And I don't know if it was 3 or 4 or 5 or 6. Whatever it was.**

Q. And this was probably 1966 or '67 you went aboard the KENNEDY, the carrier KENNEDY?

**A. Seems like I was a handyman.**

Q. Still a handyman?

**A. I was a supervisor in '74.**

Q. Would you have become a mechanic after handyman and before supervisor?

**A. Yeah.**

Q. Would you have made mechanic aboard the KENNEDY?

**A. Yeah -- wait a minute. The KENNEDY was, what, 19 --**

Q. About '66-'67, so somewhere in there is when you began?

**A. No, I didn't make -- I was still a mechanic. I made supervisor in '72.**

Q. Okay. How long were you aboard the KENNEDY?

**A. Until it was finished.**

Q. Until it finished. Was that about 3 or 4 years, again?

**A. Well, however long it was, yeah.**

Q. Well, we talked a fairly lengthy time about what you did aboard the AMERICA on the catapult and who worked around you and what you did. Do you recall that?

* * *

Q. Was it the NIMITZ?

**A. That's where I made supervisor, the, the NIMITZ.**

Q. That's where you made supervisor?

**A. That was '74 -- no, '72.**

Q. '72?

**A. '72, '71.**

Q. And you were a supervisor in the X 43 MI department.

**A. That's right.**

Q. How many people did you supervise, Mr. Oney?

**A. I would say about 25.**

Q. And how did your job duties change when you became a supervisor?

**A. Let me see. My next man was P.C. -- Percy Smith, or something like that.**

Q. How did your job change, though.

**A. It didn't change. Well, I was supervising. I just worked the people.**

Q. You worked the people.

**A. I wasn't allowed to work, put it that way. But that wasn't always true.**

Q. I'm sure you continued to work; you just didn't work with your hands.

**A. I come home clean.**

Q. Would you have been more -- would you have been off the ship and in an office, somewhat, as a supervisor?

**A. Oh, yes, yeah.**

Q. Was your office located off the ship and in a building?

**A. It was on the flight deck.**

Q. It was on the flight deck?

**A. Temporary service.**

Q. That was aboard the NIMITZ?

**A. Right.**

Q. I'm just asking if you can give us some examples of what your crew did when you were a supervisor.

**A. Well, like the kids that run the flushing rig up there by themself -- if they had to go to the bathroom I would stand by 15 or 20 minutes until they get back. Something like that.**

Q. What would you be doing during that period of time?

**A. I would be watching the valves, making sure they were doing what they were supposed to.**

Q. Monitoring the system?

**A. Monitoring, yeah.**

* * *

Q. S-E-A valves?

**A. Sea valves.**

Q. Tell me what you did on those valves.

**A. Cleaned them, sent them to the machine shop or either the repair shop. They had a repair shop. They would do whatever they were going to do to them and bring them back, and we would put them back in.**

Q. So you would remove the valve?

**A. Take it out and put it back.**

Q. But you would take it off the ship to the repair shop?

**A. They would take it to the repair shop and bring it back.**

Q. When you say they, who are they?

**A. That's the repair -- machine shop.**

Q. A different group than you or --

**A. Different group.**

Q. This is when you were actually a helper or handyman or mechanic?

**A. And a supervisor.**

Q. And a supervisor as well?

**A. (The witness nodded head.)**

Q. How would you remove the valve?

**A. Well, unbolted the Flexitallic gasket, take all the lines loose from it. The insulation has to come off. All that stuff has to come off.**

Q. That's what you meant by a liner, was the insulation?

**A. Yeah.**

Q. By and large, the crew that you worked with and supervised with on new construction -- you would do repair work to help repair crews. Is that a fair statement?

**A. Yes.**

Q. Okay. Would it be fair to say, Mr. Oney, that the majority of your work, the large majority of your work, was new work?

**A. Yes, absolutely. I'd say 99 percent of it.**

Q. Was new work?

**A. New work, yes.**

Q. And you were a supervisor from '72 until you retired in '94?

**A. Yeah.**

Q. Your job as a supervisor -- did your duties ever change during the 20-plus years as a supervisor?

**A. No.**

Q. After you retired, Mr. Oney, from the shipyard, what did you do?

**A. I got some rentals that I take care of. It keeps me busy. I can't do anything, but I can stand by and supervise.**

Q. When did you purchase your rental properties?

**A. Oh, I don't know. I've had some since 19 -- 19 -- what? '80, 1980 or 1990. '90, I think.**

Q. Some you purchased before you retired?

**A. Oh, I bought them about six years before that.**

Q. And these are all single family residences?

**A. Yeah, cheap houses.**

Q. And I recognized you're the owner and landlord.

**A. Yeah.**

Q. Do you have somebody that works for you that does maintenance?

**A. Well, yes. I just have a guy that works for us, but he don't -- you know, if I need some help, he'll help me.**

Q. You said up until the last six months you were doing the maintenance, correct?

**A. Right.**

* * *

**a 30-day job.**

Q. How many cruise liners did you work on?

**A. It was usually just on the UNITED STATES for the holidays, like Christmas**

**holidays or Thanksgiving holidays, and then they would get it out of here.**

Q. Did you work aboard that cruise liner multiple times?

**A. Once a year.**

Q. Did you put the initial packing in the valves aboard the submarines?

**A. You see, you keep hanging up on submarines. We did such minimal work on submarines, like just a few weeks. All my work is the catapults, steam catapults, now.**

Q. All right. Tell me what you personally would have to do with the pump on the AMERICA?

**A. Now, what pump are you talking about?**

Q. Any pump.

**A. We had pumps on the flexion rigs, on the flexion for temporary service pumps, and we make up the flanges, asbestos flanges, which we call Flexitallic gaskets.**

Q. All right. On the AMERICA did you have to personally install any pumps?

* * *

Q. Okay.

**A. Sheet packing the same way; stamps all over it.**

Q. Okay. How about any style number? Do you remember any of the numbers?

**A. No, I don't remember that.**

Q. Do I understand correctly that when you are going to use some packing you have to go someplace and get that packing?

**A. We have a warehouse at the shipyard.**

Q. Okay. And somebody in the warehouse would give you what you're asking for?

**A. We would get the drawings, get the right number and all that good stuff.**

Q. Okay. So you didn't see what this material came packed in, did you, when it came to the shipyard?

**A. When I came it was already wrapped up. It was in the boxes, sealed box.**

Q. Now, I think you also mentioned Garlock. Is that right?

**A. What's that?**

Q. Garlock?

**A. Garlock packing, yeah.**

Q. You used Garlock packing as well?

**A. Yeah.**

Q. And you mentioned Johns-Manville?

**A. Manville packing, yeah.**

Q. You used that packing as well?

**A. Yeah, that's on the high pressure lines, you know.**

Q. Okay. You used square packing.

Now, do you know which packing material you used most? Did you use John Crane more than, say, Garlock, or Garlock more than Manville?

**A. John Crane.**

Q. You used that more. How much more did you use John Crane?

**A. I don't really know.**

Q. You just know more?

**A. More, yes.**

Q. Of the three that you mentioned you're saying you used John Crane more?

**A. I would -- yes.**

Q. Is that correct?

**A. Yes, the Flexitallic.**

Q. Let's talk about the gasket material. Which one did you use more, John Crane, Garlock, or Johns-Manville?

**A. John Crane.**

Q. Which one did you use least?

**A. Johns-Manville.**

Q. Can you tell me the percentages? If you can't, you can't.

**A. No, I couldn't do that.**

Q. Same questions about the packing material.

Which one did you use the most?

**A. John Crane.**

Q. John Crane. Which one did you use the least?

**A. I'd say Mansville.**

Q. But you're not sure?

**A. Not sure.**

Q. And if you can go back to the 1950s -- I know it's not easy, but if you can go back to the 1950s, at that time did you know whether or not the packing materials contained asbestos?

**A. No.**

Q. Okay.

**A. No.**

Q. How about the gasket material?

**A. No.**

Q. How about the Flexitallic?

**A. No.**

* * *

carrier AMERICA, correct?

**A. Yes.**

Q. Well, when you look at this list, is this list correct, or does it need to be changed?

**A. I think that something needs to be changed.**

Q. All right. So you believe the two submarines you worked on for approximately --

**A. The date was -- I had the wrong ship at the wrong place.**

Q. All right. You testified that you worked for approximately eight months on the VON STEUBEN and the SHARK.

**A. I know I did. That's wrong.**

Q. Okay. Is it in fact the RAYBURN and the CARVER that you have on this list?

**A. Yes.**

Q. Well, was the work any different on these than you testified to earlier?

**A. No, the same.**

Q. Okay. Now, down on the overhauls I noticed that the ENTERPRISE is mentioned, and that has not been mentioned today.

Can you tell me what work, if any, you did on the ENTERPRISE?

**A. That's the ENTERPRISE on the overhaul.**

Q. All right. Tell me what you did on that.

**A. That was from '94 down.**

Q. And what did you do on the interest rise?

**A. We took out all the catapult system.**

Q. And there were two overhauls. Did you work on both of them?

**A. I worked on every one. I was working a little bit on the last one.**

Q. All right. Let's talk about that, then. Approximately, if you know, how long did you work on the ENTERPRISE during the first overhaul?

**A. Oh. Well, how long was it in there for? Let me figure that out.**

Q. Just answer if you know. If you don't, that's okay, too.

**A. I worked from start to finish on the overhaul, but I don't know what the dates were.**

Q. So however long it was there you were on it the entire time?

**A. That's right.**

Q. Did I understand your answer a minute ago that the second overhaul you weren't on it as long?

**A. About the same amount, yes.**

Q. You were?

* * *

VIRGINIA:

IN THE CIRCUIT COURT FOR
THE CITY OF NEWPORT NEWS

| | | |
|---|---|---|
| SANDRA KAY ONEY, Executor of the Estate of SHARON VAUGHN ONEY, deceased, Plaintiff, v. | ) | CASE NO. 00301TF |
| JOHN CRANE, INC., Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
March 16, 2007

BEFORE: THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

Appearances:
PATTEN, WORNOM, RATTEN & DIAMONSTEIN, L.C.
By: ROBERT R. HATTEN, ESQUIRE
HUGH B. McCORMICK, III, ESQUIRE
WILLIAM W. C. HARTY, ESQUIRE
ERIN HIERONIMUS, ESQUIRE
J. CONARD METCALF, ESQUIRE
and
GLASSER and GLASSER, P.L.C.
By: RICHARD S. GLASSER, ESQUIRE
Counsel for the Plaintiff

* * *

So the Virginia Supreme Court has already essentially given us the nod that, you know, let the people who are nonparties on the verdict form doesn't fly unless, as McDermott said, they are settled parties.

Now, Johns-Manville had settled in the Jones case and they were a nonparty, so why did we let them on the verdict form? Because under McDermott they had settled even though they weren't on the verdict form, and because there's a court order in New York that approved the Johns-Manville bankruptcy which specifically said, If you take a settlement from Johns-Manville Corporation you must accept either the percentage of fault assigned by the jury or the amount that you are paid, whichever is higher. And so it was a court-ordered precondition of our accepting the settlement with Johns-Manville and we were bound by it.

So the Johns-Manville thing is not in this case because we haven't settled with any bankrupt companies. We filed claims with one or more bankrupt companies, with Westing - - Western Asbestos in California, where the plaintiff worked for a short period of time. The claim has been denied, but -- and there have been companies in this case that as we got into the case we nonsuited those parties because we didn't have enough evidence to justify continued prosecution of the case.

The law is clear, if you're a party fault can be allocated to you, even though it's joint and several liability. And if you have settled, a

percentage of the fault can be assigned to you. Otherwise, the Courts have said you cannot - - it is unfair - - it's basically unfair for there to be an allocation of fault to people who aren't represented in the courtroom. And joint and several liability gives them the opportunity to go and file a contribution claim against anybody they want after the verdict. In fact, before the verdict they had every opportunity to name and cross-claim or counterclaim any other defendant, but they didn't.

And so to suggest that we can put on evidence about a party who may be bankrupt, for instance, Pittsburgh Corning Corporation, say, who made a particular type of product, and assign a percentage to that company who is not even before the Court - - and we couldn't sue them because there's an injunction against any suits whenever bankruptcy is filed - - is just to make a mockery of fair play in these courts.

And so the burden in this matter is for the plaintiff -- that's what joint and several means. A very simple fact. I can sue any one or more of the companies and proceed against them that I want to. It's no different than Virginia law, except for the one caveat, and that is that if you've settled we don't have a dollar-for-dollar credit under maritime law. We have a percentage-of-fault credit. But even that requires that the Court at the end of the evidence make a decision, can the causation in this case be reasonably apportioned? And that's a factual finding that you're going to have to make at the end of the case. And if you find that it can't be, as the Ohio court did that we cited in our brief - - and that was

an asbestos case. The Ohio court says, This disease mesothelioma is an indivisible disease. There isn't any reasonable way I can look into this man's lungs and say ten percent is from this and 20 percent is from this and 50 percent is from that. And there hadn't been any evidence that shows any way that this could be apportioned. And so since I can't find any reasonable way to apportion this injury, I'm saying it's joint and several. And whoever is in the courtroom takes care of the plaintiff, and if they want to get contribution then they can go against somebody else.

That's a decision you don't have to make today because the evidence is not in today. But I would submit to you that the rulings of the court about nonparties and about bankrupt parties, anybody except the party before the court, and someone who has settled, have been consistent for quite some time, ever since maritime law was applied by this court.

So a lot more could be said on this, but I think that the essence of the defendant's brief, which. really does not have any authority - - there's no authority for nonparties being on the verdict form. There's no authority for bankrupt parties that have not been - - who have not settled being on the verdict form.

Essentially, what Mr. Wallace is saying is that this just isn't fair, Your Honor. Well, I didn't make the rules. The Virginia Supreme Court - - I mean the United States Supreme Court made the rules in the McDermott case and joint and several is the rule unless you've settled.

And so I would ask that the Court abide by the multiple previous rulings on this subject relating to nonparties and relating to bankrupt parties and relating to the Newport News Shipyard.

And the Newport News Shipyard issue is - - it just is mind-boggling how they could think they can go into the face of two direct Supreme Court opinions right on point, the Edmonds case and all the way back to the Halcyon Lines case in 1952, which have specifically ruled that this legal argument is rejected.

So, Your Honor, all of these issues are- - about the shipyard, bankrupt parties, nonparties, are rolled into that one issue. The only reason that the court has held these nonparties have -- any evidence can come in about them at all is not because they were negligent, because concurring negligence is irrelevant. You could have 50 people that were concurringly negligent, but if they're not before the court their negligence is irrelevant.

The issue is, and their doctors try to make this issue, that some other product is completely responsible for the disease. That's a factual issue. We've got to litigate it. But that doesn't mean - - and at the end of the day if I haven't been able to prove that John Crane was a substantial contributing cause, I lose. But that doesn't mean that they get the benefit of a proportionate-fault assignment to these nonparties, whether they're bankrupt or whether they're nonsuited or anything else. They do get a chance to try to prove that they are completely blameless because these other parties are completely at fault.

But that's not a jury-verdict issue and I think what we're talking about here is the assignment of a percentage of fault. Thank you very much.

THE COURT: Yes.

MS. BUGG: Good afternoon, Your Honor. My name is Patricia Bugg. I'm also here on behalf of John Crane with my co-counsels Mr. Wallace and Mr. Moran.

We also have our motion to apply Virginia law as opposed to maritime law, and I'm going to hold off on that motion and I'll very briefly discuss it --

THE COURT: Okay.

MS. BUGG: -- in a moment. I know you've already heard...

THE COURT: That's all right, because there's also - - did you do this list?

MS. BUGG: The list itself?

THE COURT: Yes.

MS. BUGG: I had some assistance, but yes.

THE COURT: I was going say Mr. Wallace did a great job. But there's a subpart D also there for the motion to apportion fault proportionately.

MS. BUGG: Right.

THE COURT: So under two there's two plaintiff's motions and two defense motions.

MS. BUGG: Yes, Your Honor.

THE COURT: All right.

MS. BUGG: And, first, I'm going to address our motion to apportion fault proportionately, which is essentially a response to Mr. Hatten's motion that he just discussed.

I'd like to --

THE COURT: If you'd give me one moment, I have official rubber bands on these.

MS. BUGG: All right. Take your time.

THE COURT: Well, there were some that were -- one was a total exhibit to another thing, I think, that had a Washington and Lee law review article on it. Something else.

Okay. Go ahead.

MS. BUGG: Your Honor, in replying to their motion to apply joint and several, I'd just like to make it clear that we are proceeding for this purpose on the assumption that maritime law does apply, and then I'll refer to that - - to our argument as to why it should not.

THE COURT: Not waiving your objection thereto.

MS. BUGG: Exactly.

THE COURT: All right.

MS. BUGG: Thank you, Your Honor.

So, Your Honor, assuming that admiralty jurisdiction is proper, the question essentially becomes, when you're dealing with damages in a maritime setting is apportionment possible, is it allowable, and, if so, how do you deal with the negligence of others, how does proportionate fault tie in, and how does proportionate fault tie in with the joint and several liability principles that Mr. Hatten just discussed?

Now, both parties have extensively briefed this issue and I'd like to incorporate our motion to apply apportionment of fault proportionately as well as our reply to opposing counsel's motion to apply joint and several. And because these motions are so detailed and they're so dense, today I really just want to point out a few issues and basically present to the Court what our position really is and why we do not think today that it is meritless or that we are trying to make a mockery of the court today.

And, Your Honor, our position or proposal for the Court is essentially to adopt something that's akin to a limited joint and several liability approach rather than pure joint and several liability principles. This approach would allow defendants to show the involvement of many other tort-feasors whose actions did contribute to plaintiff's injury and regardless of whether or not they were ever named a party or whether the

plaintiff has ever received any sort of settlement sum from them.

Now, I realize that this is something that is different and, as Mr. Hatten's pointed out, it's not something that has been applied in the past, but I'd like to point out that these asbestos cases involve so many different manufacturers that this is the type of case when a ruling allowing the defendants to bring in the actions or inactions of other parties would be possible because the defendant - - excuse me, the plaintiff chooses to pick, for example, 12 of those manufacturers to proceed to trial, when in reality there may be 30, 40, 50 other manufacturers out there that equally contributed to his mesothelioma.

Your Honor, this approach also allows you to show that at most John Crane was only partially responsible for the plaintiff's injuries. In effect, Your Honor, the jury should be permitted to consider everyone who has contributed to the plaintiff's injury and/or Mr. Oney's injury especially in light of the expected testimony of plaintiff's experts that every fiber or every exposure to asbestos products' has contributed or caused Mr. Oney's mesothelioma. Because plaintiff is proceeding on this theory, it's only fair that every fiber must be considered by the jury in apportioning fault or damages.

Now, the plaintiff does contend that it's up to John Crane to prove that these other entities or manufacturers did contribute in some way to Mr. Oney's mesothelioma. And that's true to some extent, but Mr. Oney has said himself in his asbestos

exposure form found in his answers to interrogatories on -- excuse me, found in Exhibit 2, that he was exposed to -- and I have a copy of this with me, Your Honor, if you'd like to see it. I don't believe you have it in front of you -- that he was exposed to Garlock, Flexitallic, John Crane and Johns-Manville gaskets and gasket sheet material; John Crane, Garlock and Johns-Manville packing; Worthington, Denison, Vickers, Goulds, Buffalo and Warren Pumps; Leslie and Crane Company grinding wheels; Crane Company valves.

And Mr. Oney and his coworkers in their depositions have stated that he worked around all trades, including insulators, welders, electricians, pipe fitters, riggers. So essentially Mr. Oney had shipwide exposure.

In Mr. Oney's affidavit about the work that he performed in Todd Shipyard in Alameda, California, which also I have a copy of if Your Honor would like to see it, it states, Mr. Oney says himself that he worked with and around insulation materials, including, but not limited to, pipe insulation. He worked all over the ship, including engine rooms, catapults, boiler rooms, and other locations. And he worked around other trades; insulators, pipe fitters, shipfitters, other machinists and outside personnel, and that some were installing and tearing out asbestos-containing products, including, but not limited to, pipe insulation.

Thus, Your Honor, under the plaintiff's proposed theory that every asbestos fiber and/or every exposure to asbestos products contributed to Mr. Oney's injury, every manufacturer that has been

mentioned throughout the course of this litigation should be taken into consideration by the jury when it's apportioning damages. And this is a perfect case to apply this sort of approach because so many manufacturers have been identified and apportionment is permitted in a maritime setting when relative fault can be determined. And we submit this is a case when it could be determined.

Your Honor, plaintiff's position is that joint and several liability applies in a maritime setting, has always applied in a maritime setting and should apply in this case. But in the asbestos cases in Virginia that have been tried since admiralty jurisdiction was invoked, the Courts have permitted the juries to apportion damages in some respect. So I don't think they disagree that apportioning damages to some extent is definitely permitted.

Now, the Courts in both Little and Jones did allow the juries to consider the apportionment among several defendants and other parties. Specifically in Jones the Court allowed the jury to consider the fault of John Crane, Johns-Manville, Garlock, Goulds Pumps, Foster-Wheeler, and Westinghouse. But John Crane submits today that the verdict that was given in that case was erroneous, we think, because the jury was not permitted to consider every fiber that contributed to the plaintiff's injury. Thus what John Crane essentially disagrees with today is how many entities may be considered when apportioning damages and to what extent apportionment is permitted in a maritime setting.

We're contending that every manufacturer who has been identified as a contributing factor to Mr. Oney's mesothelioma should be considered by the jury when apportioning fault at trial, especially in light of that theory that's going to be proposed by the plaintiff that every fiber or every exposure to these products contributed.

Now, opposing counsel did mention Johns-Manvilie in their argument and how I believe it was in Little the Court did allow damages to be apportioned to Johns-Manville. And that was because they essentially found that the plaintiff had received some sort of settlement from them.

Now, Your Honor, in this case it does not matter that plaintiff has not yet received a settlement from Johns-Manville, if that's in fact the case, because what's important is that that option is readily available to plaintiff. Because the plaintiff has the option of receiving some sort of settlement from Johns-Manville, provided that they meet certain requirements, then they, too, should be taken into account by the jury when apportioning damages.

Your Honor, in regards to the shipyard and the Wavy, we're submitting today that the jury should also be able to consider the actions or inactions of these parties. Now, I recognize that the shipyard is a party that's immune from judgment by virtue of the Virginia Workers' Compensation Act, but when you look at the Reliable Transfer line of cases essential to so many of those cases is the proposition that damages in a maritime setting should be allocated fairly. And that's basically what we're asking today, Your Honor. Because so many

manufacturers have been identified in this case and because plaintiff is contending that every single fiber of asbestos and every single exposure that Mr. Oney had to asbestos products did contribute or cause -- excuse me, contribute to or cause his mesothelioma, that because of that John Crane should be able to ask the jury to consider the relative fault of many different entities, not limited to those that either remain at trial or that were defendants who settled but also including parties who have been nonsuited, bankrupt parties, parties that weren't even named, because in these asbestos cases there are so many manufacturers that did contribute possibly to Mr. Oney's mesothelioma.

And that being said, if Mr. Hatten doesn't mind, I can very briefly touch on the Virginia motion -- unless you'd like to respond.

MR. HATTEN: I'd like to respond briefly.

MS. BUGG: Go ahead.

MR. HATTEN: Your Honor, the plaintiff's deposition was taken in this matter July 13, July 14, 2006. And at that time, in fact a month before, he had identified all these products that he believed that he may have been exposed to. And so John Crane has been on notice of these potential other exposures for nine months. At no time have they ever amended their pleadings to cross-claim, counterclaim or add these other defendants to the case. And at all times throughout that period of time they knew that my witnesses, experts, were going to say that it's the cumulative dose of exposure that

causes the disease and that all exposures contribute to the dose and contribute to the disease, and that you can't -- it's an indivisible disease process.

And so for them to come in here now when they had control of who was going to be in this lawsuit every bit as much as I had control -- I exercised my privilege under joint and several liability to sue those companies that I thought that I could prove the best case against. They have the right of contribution after the verdict and they had the right before the verdict to counterclaim and to bring these companies into the case, which they did not despite having full notice of the fact that these other people are there.

And it is just amazing to me that they think that they can assign fault to the United States Navy, which is immune from this litigation because they are the United States Navy, and the Newport News Shipyard in the face of two very direct cases on point from the Supreme Court of the United States.

So, Your Honor, we didn't create the fact that these other parties are not in the courtroom. We exercised our right. They slept on their rights. And the only authority they rely upon is a law student's note in a law journal. Unfortunately for John Crane, there's not a single judge in the United States that has ever agreed with their theory about what's fair.

Now, I would ask that the Court follow the law and let fairness be decided by the Supreme Court of the United States and other courts that

have this issue before them in which it has not been repeatedly decided.

THE COURT: Are the others tied in? Did you want to keep going or do you want to -- as to the application of Virginia law?

MS. BUGG: Well, I will mention the Virginia -- whether Virginia law will apply, but if you'd like to talk about the apportionment issue - -

THE COURT: Well, let me ask you a question. Shouldn't I have a serious reservation about whether federal maritime principles permit a Court to enter a judgment reflecting a jury's apportionment of damages among entities who were never named defendants in the lawsuit before the court and from whom plaintiff has received no compensation for his injuries?

MS. BUGG: Well, Your Honor, there are cases that do suggest that that may be improper, but so many of those cases did not deal with the facts that we're presented with today. The proposal that we're offering to the Court today is specifically in relation to asbestos cases because there are so many tort-feasors.

When you're looking at a collision case, for example, when possibly there are three boats involved and the plaintiff decides to only sue one, you know, possibly bringing in the other defendant or mentioning their negligence may not be appropriate in that case, but those cases don't deal with the situation we have here when there are just numerous manufacturers and numerous tort-feasors

that did contribute to the plaintiff's injury. And that really is why we're proposing that this sort of limited joint-and-several-liability approach is appropriate in this case.

Your Honor, in reference to the law article that we cited in detail in our brief, it may have been written by a third-year law student, but that guy is now in New York just -- you know, for a big firm, and he's written a ton of articles about maritime law. And it really should have no relevance that he was only a third-year law student as the principles that he presents are very convincing and it's something that I think the Court should look at. 'And it basically gets into McDermott, it gets into Edmonds, and it really in detail discusses why it would be appropriate to have certain parties discussed and brought into the jury's attention when apportioning damages.

So, Your Honor, essentially we are asserting today that because we're in an asbestos case where there are so many tort-feasors that that is why apportioning fault among every identified manufacturer would be appropriate. Thank you. Your Honor.

THE COURT: Now, when we're talking about applying joint and several liability and prohibiting allocation of comparative fault to nonparty entities, in this instance, Mr. Hatten, there are no payments from the bankruptcy trust, correct?

MR. HATTEN: Correct.

THE COURT: So you're talking about allocation of damages among parties that have settled with the plaintiff?

MR. HATTEN: Yes, sir.

THE COURT: And among the liable nonsettling parties subject to comparative fault by the defendant?

MR. HATTEN: No. No liability for nonsettling -- I mean nonparties.

THE COURT: Liable nonsettling parties. There's only one.

MR. HATTEN: I'm sorry. I apologize, Your Honor.

THE COURT: So that's what we're talking about?

MR. HATTEN: Yes.

THE COURT: All right.

MS. BUGG: Your Honor, if I may just say one thing - -

THE COURT: Sure.

MS. BUGG: -- we also submit that even though the plaintiff has not yet received compensation from a bankrupt trust, but because it's possible, they, too, should be able to be brought into the jury form, not just --

THE COURT: As you know, the quote I read you was from Little. And, you know, I think it's pretty clear the Supreme Court - - of course, not actually. They clearly said it. They have serious reservations about that. You know, so I don't intend to get off that particular reservation at this point.

Now, if they want to change all that, that's fine as far as that goes, but I think that they provide enough guidance in that. I agree with the procedural, you know, arguments of the defendants. And not only did you cite the article, you gave me a copy, and I did the very best I could do read it, but --

MS. BUGG: It is fairly dense.

THE COURT: Yeah, it was dense in about the third or fourth page. The ABCs were killing me in trying to figure that out at that point.

So I'm sure he's an extremely intelligent person at that point, but when he writes one that has Supreme Court Justice at the end of it I suppose I'll be listening to him a little more closely at this point.

Plaintiff's motion to apply joint and several liability and prohibit allocation of comparative fault to nonparty entities is granted.

The next one, which is related, and we discussed it, motion to prohibit evidence relating to negligence of nonparty and/or bankrupt companies.

Now, that's granted, and I believe that's an area that is, you know, fraught with danger when

we're talking about what we're doing and what we're saying. As I recall, that may be the reason the Jones case didn't go past the third day. We're talking about evidence. The motion is granted.

Do you all understand what it is you're limiting yourselves to?

MR. HATTEN: Yes. Causation evidence is the only evidence of settled parties that -- I mean is the only evidence of nonparties that it can come forth. No negligence. No conduct.

THE COURT: I understand. The people trying this case are in this room right now, correct?

MR. HATTEN: Yes, sir.

THE COURT: Okay. So it's already been tried once and we know where we're going with it.

MR. WALLACE: Sure. I don't think we had a problem before, but I'll say this.

THE COURT: I just know it by rumor. I didn't pay attention to what happened.

MR. WALLACE: Mr. Hatten in the second case didn't open that up. He did open it up in the first. We disagreed on this pretty severely. He opened it on the first. Mistrial was granted. He didn't get it to it on the second. We didn't go there either. And I assume that's where we're going here.

If he opens it, I'm coming. If he doesn't open it, I'm staying away.

MR. HATTEN: Well, let's back up.

THE COURT: I didn't mean to open this up.

MR. HATTEN: What is the state of the art --

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[ENTERED: FEBRUARY 26, 2007]

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS**

| | | |
|---|---|---|
| **Sandra Kay Oney, Executor of the Estate of SHARON VAUGHAN ONEY, Deceased** | ) | |
| **Plaintiff,** | ) | **Case No.** |
| **v.** | ) | **00301TF** |
| **JOHN CRANE INC., et al.,** | ) | |
| **Defendants.** | ) | |

**DEFENDANT, JOHN CRANE INC.'S MOTION TO 1) APPORTION FAULT OF JUDGMENT-PROOF DEFENDANT PROPORTIONALLY AMONG BOTH SETTLING AND NONSETTLING DEFENDANTS, AND 2) PERMIT THE JURY TO APPORTION FAULT TO EMPLOYER SHIPYARD, AND MEMORANDUM IN SUPPORT**

Defendant, John Crane Inc. ("John Crane"), by counsel, moves this Court to 1) apportion any damages awarded at trial among all manufacturers who contributed to the plaintiffs injury such that a judgment-proof tortfeasor's share of damages is divided among all tortfeasors, both settling and nonsettling, that are not judgment-proof proportionately to their degree of fault, for reason that said approach is consistent with the principle of

proportionate fault, promotes settlement without imposing unnecessary pressure to do so, and comports with judicial economy; and to 2) permit the jury, when apportioning damages among the defendants, to consider the negligence and fault of the employer shipyard, a negligent actor who was never named a party to this action solely by virtue of the Virginia Workers' Compensation Act. In support thereof, John Crane submits the following memorandum:

## STATEMENT OF FACTS

In early February, 2006, Sharon Vaughn Oney was diagnosed with mesothelioma. On February 21, 2006, the law firm of Patten, Wornom, Flatten & Diamonstein, L.C. filed suit on Mr. Oney's behalf. In his complaint, Mr. Oney named as defendants twelve (12) manufacturers and suppliers of asbestos containing products, including John Crane, alleging that each manufactured products to which he was exposed during his employment at the Newport News Shipbuilding and Drydock Company (hereinafter "NNSDC") and that each manufacturer's products served as a substantial contributing factor to Mr. Oney's mesothelioma. See Abbreviated Compl. After Mr. Oney's death on or about November 17, 2006, Sandra Kay Oney, Mr. Oney's wife, filed an amended complaint for the wrongful death of her husband against the remaining eleven (11) defendants alleging again that the products of each of the manufacturers substantially contributed to Mr. Oney's death. See Pl.'s Am. Abbreviated Compl.

In addition to those defendants named in Plaintiffs complaint, during the course of discovery in this matter, both Mr. Oney and his co-workers have identified several other manufacturers and/or suppliers of asbestos containing products to which they claim Mr. Oney was exposed, including, but not limited to, Johns-Manville, Flexitallic, and Victor. The manufacturers or suppliers not named by Mr. Oney and his co-workers in this action were likely not named because of their bankrupt status, such as Johns Manville. Some, such as Johns-Manville, have a trust in place from which all claimants meeting certain requirements of exposure to its products and diagnosed with an asbestos related disease are entitled to certain sums of money.

At trial, Plaintiff intends to elicit testimony from her experts that every asbestos fiber and/or every exposure to asbestos served as a substantial contributing cause of Mr. Oney's mesothelioma or, if that is not permitted by this court under another Motion of John Crane, that every asbestos fiber and/or exposure increased his risk of contracting a mesothelioma and subsequent death. See Pl.'s List of Fact & Expert Witnesses. Under either theory, every manufacturer will be charged with some contribution to the claim of Mr. Oney so that none to whose products Mr. Oney was exposed can be excluded as a matter of law from consideration by the jury as possible culprits in Mr. Oney's death.

During the course of this litigation, Plaintiff has settled with or dismissed all but two defendants, i.e., John Crane and Crane Co. At trial, Plaintiff will seek a full recovery from these two in spite of the

many manufacturers of asbestos-containing products Mr. Oney has specifically named claiming exposure to their products. Given the numerous manufacturers of asbestos products that have been identified during the course of this litigation as manufacturers of products to which Mr. Oney was exposed, and given the expected testimony of Plaintiffs experts that every fiber and/or exposure to asbestos contributed to Mr. Oney's injury and death or to his risk of developing a mesothelioma, apportioning damages among all tortfeasors pursuant to a "limited joint and several liability approach" detailed below is warranted instead of the patently unfair system used to date of pure joint and several liability.

## HISTORY OF DAMAGE APPORTIONMENT IN A MARITIME SETTING

In The Schooner Catharine v. Dickenson, 58 U.S. 170 (1854), the Court first addressed the situation that often arises in maritime commerce where a wrong has occurred, but the precise determination of fault is extremely difficult. There, two ships, each negligently operated to some degree, collided off the New Jersey shore, causing one of them to sink. Id. at 173. Rather than hold one ship liable for more damages than the other, the Supreme Court followed a long line of English decisions by establishing a "divided damages" principle in U.S. maritime jurisprudence. Id. at 177. Put simply, where both vessels were determined to be at fault, the loss was to be divided equally among them without regard to their relative degrees of fault. Id. In support of its decision, the Court stated

that "[u]nder the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation." Id. at 177-78.

The divided damages principle endured without challenge until United States v. Reliable Transfer Co., 421 U.S. 397 (1975). Citing "palpably unfair results" in cases where one party was clearly more at fault than another, the Supreme Court held that liability "is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault." Reliable Transfer, 421 U.S. at 405, 411. This holding resulted in The Schooner Catharine rule of divided damages being limited but not wholly discarded by the Court, as "[w]hen it is impossible fairly to allocate degrees of fault, the division of damages equally between wrongdoing parties is an equitable solution." Id. at 407. The operative reasoning for keeping the divided damages approach in some instances was to assure fairness in the allocation of damages. Id. at 410-411.

Four years later, the Court, without upsetting the proportionate fault approach of Reliable Transfer, reaffirmed the well-established principle of joint and several liability in a maritime setting in Edmonds v. Compagnie Generate Transatlantique, 443 U.S. 256 (1979). There, a longshoreman was injured while working on a ship not owned by his employer stevedoring company. Id. at 258. Under

the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), the plaintiff both received benefits from his employer and brought an action against the shipowner. Id. The jury returned a verdict of $100,000 and apportioned damages at 10% to the plaintiff, 20% to the shipowner, and 70% to the stevedoring company. Id. After adjusting the award by the amount of the plaintiffs own negligence, the Court, faced with interpreting the meaning of the 1972 Amendments to the LHWCA, refused to reduce the judgment against the defendant shipowner by the proportionate fault attributed to the stevedore company, whose liability was limited by the LHWCA. Edmonds, 443 U.S. at 263, 269. The shipowner was therefore liable for 90% of the judgment even though his conduct was determined to have caused only 20% of the harm and even though he had no contribution rights against the statutorily-immune stevedore. Id. The Court justified this disproportionate outcome by reasoning that Congress, through the 1972 Amendments, had not intended to upset the "long-established and familiar principle of maritime law [- joint and several liability -] by imposing a proportionate-fault rule" in that specific case. Id. at 263. Thus the Edmonds Court reaffirmed the application of joint and several liability in maritime settings involving the interpretation and application of the LHWCA, an act meant to protect the injured longshoreman. Id. at 270.

In 1994, fifteen years after Edmonds, the U. S. Supreme Court, faced with a partial settlement issue in a joint and several setting, adopted a proportionate share approach to resolve the issue of

whether in admiralty cases "the liability of... nonsettling defendants should be calculated with reference to a jury's allocation of proportionate responsibility, or by giving them a credit for the dollar amount of a settlement entered into before trial." McDermott, Inc. v. AmClyde, et. al., 511 U.S. 202, 205 (1994). There, McDermott sued a crane manufacturer (AmClyde), the manufacturer of a crane hook (River Don), and three manufacturers of steel slings for damage to a crane and an offshore platform deck. Id. at 204-5. Before trial, McDermott settled with the three sling defendants for $1 million dollars. Id. at 204. The other two defendants did not settle, and the case went to trial where a jury assessed the plaintiffs damages at $2.1 million and apportioned liability at 32% to AmClyde, 38% to River Don, and 30% jointly to McDermott and the sling defendants. McDermott, Inc., 511 U.S. at 206. Faced with the task of determining how the $1 million settlement with the sling defendants should affect the liability of the nonsettling defendants, the Court turned to the Restatement (Second) of Torts, which identified three principal alternatives: 1) *pro tanto* credit with a right of contribution from the settling defendant; 2) *pro tanto* credit with no right of contribution; and 3) credit for a settling defendant's "proportionate share" of responsibility for the total obligation. Id. at 208-9.

The Court unanimously adopted the "proportionate share" approach, under which any amount paid in settlement extinguishes any claim that the injured party has against the released defendant and also diminishes the claim that the injured party has against the nonsettling defendants

by the released defendant's proportionate share of responsibility for the total obligation. Id. at 209, 217. Pursuant to this approach, "no suits for contribution from the settling defendants are permitted, nor are they necessary, because the nonsettling defendants pay no more than their share of the judgment." Id. at 209. River Don was therefore only responsible for its precise share of the damages - 38% of $2.1 million, or $798,000.[1] Id.

In choosing among the alternatives pronounced in the Restatement, the Court labeled three considerations as "paramount": (1) consistency with the proportionate fault approach of United States v. Reliable Transfer, (2) the promotion of settlements, and (3) judicial economy. McDermott Inc., 511 U.S. at 211. After dismissing *pro tanto* with contribution as against judicial economy, the Court first focused on consistency with Reliable Transfer to choose between a *pro tanto* without contribution and a proportionate share approach. McDermott,. Inc., 511 U.S. at 212-214. It noted that the proportionate share approach was more consistent with the proportionate fault rule of Reliable Transfer because, unlike *pro tanto* without contribution, a litigating defendant pays only its equitable and proportionate share of the judgment. Id. at 212. Under the *pro tanto* approach, "a

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[1] The other nonsettling defendant, AmClyde, was determined by the Court of Appeals to be contractually immune from liability. However, McDermott did not request that River Don pay any more than its 38% of damages. McDermott, Inc., 511 U.S. at 211 n. 10. Thus, in McDermott, the Court was not directly faced with the first issue this Court is asked to consider today — how to apportion the share of responsibility of a defendant immune from judgment among other non judgment-proof defendants.

litigating defendant's liability will frequently differ from its equitable share, because a settlement with one defendant for less than its equitable share requires the nonsettling defendant to pay more than its share." Id. The Court further found that "such deviations from the equitable apportionment of damages [would] be common, because settlements seldom reflect an entirely accurate prediction of the outcome of a trial." Id. at 212-213. Rather, "settlement reflects the uncertainty of trial and provides the plaintiff with a 'war chest' with which to finance the litigation against the remaining defendants." Id. The Court therefore concluded that the *pro tanto* approach was likely to lead to inequitable apportionments of liability in violation of Reliable Transfer.

The Court next examined the effects of the two rules on settlements and judicial economy. McDermott, Inc., 511 U.S. at 214-218. While it noted that the pro *tanto* approach may at times better promote settlement, the incentives to do so would come at too high a price. Id. at 215. It reasoned that the *pro tanto* approach encourages settlements by allowing early-settling defendants to pay less than their equitable share of damages, yet threatens "the nonsettling defendant with the prospect of paying more than its fair share of the loss." Id. (emphasis added). Though public policy encourages settlement, the Court found that such additional pressure to settle was unnecessary and came at "too high a price in unfairness." McDermott, Inc., 511 U.S. at 215. Thus, the *pro tanto* rule was found to have no "clear advantage" in promoting settlement. Id. at 216. Additionally,

because both approaches would require the relative fault of the parties to be determined, either at a separate pretrial hearing or at trial, the *pro tanto* approach maintained no advantage over a proportionate share approach with respect to judicial economy. Id. at 216-217.

In adopting the proportionate share approach, the Court also considered the relationship between joint and several liability, reaffirmed by the Court in Edmonds, and its adoption of proportionate share apportionment. Id. at 220-21. It asserted that there was "no tension between joint and several liability and a proportionate share approach to settlements," just as the adoption of comparative fault in Reliable Transfer in no way abrogated principles of joint and several liability. Id. at 220 (emphasis added). The Court characterized Edmonds as "merely reaffirming the well-established principle of joint and several liability... [which] applies when there has been a judgment against multiple defendants," and "can result in one defendant's paying more than its apportioned share of liability" when the plaintiffs recovery from the other defendants is limited by outside forces. McDermott, Inc., 511 U.S. at 220-21 (emphasis added). That is, "when the plaintiffs recovery from other defendants is limited by factors beyond the plaintiffs control, such as a defendant's insolvency," "joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall." Id. A plaintiffs decision to settle with a defendant, however, does not constitute a limitation on the plaintiffs recovery "by outside forces, but [rather] by its own agreement to settle." Id. In the latter situation, the Court saw

"no reason to allocate any shortfall to the other defendants, who were not parties to the settlement," and thus should not be prejudiced by the plaintiffs own decision to settle. McDermott, Inc., 511 U.S. at 221. The Court therefore reduced the plaintiffs recovery from the nonsettling defendant by the settling defendants' proportionate share of responsibility for the total obligation pursuant to a proportionate share approach.

The McDermott Court was not faced with how to apportion fault in a situation where, as here, multiple tortfeasors, some named and others not named as defendants, have been identified as having contributed to a plaintiffs injury. As noted in Becker v. Poling Transp. Corp., 356 F.3d 381, 390 (2nd Cir. 2004), however, under maritime law, "where two or more joint tortfeasors act independently and cause a distinct or single harm, for which there is a reasonable basis for division according to the contribution of each, then each is liable for damages only for its own portion of the harm." (emphasis added). As explained below, under this approach, a jury is to apportion fault among all those negligent parties identified as tortfeasors regardless of whether they have been named as defendants in the suit. Allowing a defendant to introduce evidence of the fault of another tortfeasor, who was never named party to the suit, is not a novel idea. See Allen v. Owens-Corning Fiberglas Corp., 225 Mich.App. 397, 403 (1997) (holding that a defendant may introduce evidence that the plaintiffs mesothelioma was attributable to other manufacturers' products, even though they were not party to the action); Laney v. Celotex Corp., 901 F.2d 1319, 1320 (6th Cir. 1990)

(holding that evidence of a plaintiff s exposure to other asbestos products goes to the fundamental questions of cause).

The McDermott Court also failed to address how the share of responsibility for a plaintiffs injury of a tortfeasor who is bankrupt, insolvent, or otherwise immune from judgment, should be apportioned among remaining identified tortfeasors. As explained below, however, the three considerations deemed paramount by the McDermott Court are best served by applying an approach, detailed below, that at least one commentator has termed "limited joint and several liability." Under such approach, after the jury has apportioned fault among all identified tortfeasors, it then reallocates the fault of the tortfeasor immune from judgment among all remaining identified tortfeasors, regardless of whether they were ever named as a party.

In Garlock Sealing Technologies, LLC v. Little, 270 Va. 381, 387-88, 620 S.E.2d 773, 777 (2006), the Supreme Court of Virginia recently faced whether this Court erred by requiring the defendant to compensate the plaintiff for damages apportioned to certain insolvent entities. The Court refused, however, to consider the issue in full, stating that "no litigant... will be permitted to approbate and reprobate - to invite error... and then take advantage of the situation created by his own wrong." Id., citing Cohn v. Knowledge Connections, Inc., 266 Va. 362, 367, 585 S.E.2d 578, 581 (2003). Despite disposing of the issue on procedural grounds without deciding the issue, the Court did maintain

reservations regarding whether "federal maritime principles permit a court to enter a judgment reflecting a jury's apportionment of damages among entities who were never named defendants in the lawsuit before the court and from whom plaintiff has received no compensation for his injuries." Id. Citing McDermott, Inc., the Court stated that joint and several liability "can result in one defendant's paying more than its apportioned share of liability when the plaintiffs recovery from other defendants is limited by factors beyond that plaintiffs control, such as a defendant's insolvency." Id. at 388, fn. As explained below, this statement from McDermott does not preclude the Court from applying a limited joint and several liability approach. Nor are the statements of the Virginia Supreme Court controlling here, as they were merely dicta and failed to consider the issue fully.

## ARGUMENT

John Crane proposes an apportionment scheme that permits allocation of fault to four classes of tortfeasors: A) Defendants "at the table" at verdict, i.e., tortfeasors who were sued by the plaintiff and have not settled; B) Defendants who were sued by the plaintiff but settled before the verdict; C) tortfeasors who were sued by plaintiff that have declared bankruptcy but have established a trust for compensation of injured asbestos workers and their families; and D) all persons or corporations who contributed to the plaintiffs injury but were not sued by the plaintiff. Then, once percentages have been assigned, John Crane asks that all fault that has been apportioned to a tortfeasor from which

plaintiff has no hope of recovery be split proportionally amongst all solvent, non-immune tortfeasors, including settling defendants. Finally, all defendants left at the table at verdict would be responsible for only the shares allocated to them.

In Garland Jones v. John Crane, the last John Crane asbestos case in this Court, fault was apportioned among the categories listed A, B, and C above, but those in category D were not considered by the jury. Because plaintiffs theory of causation holds that every exposure above background level is a substantial contributing factor to a subsequent mesothelioma, any manufacturer of asbestos products identified by the plaintiff or her witnesses must necessarily be responsible for Mr. Oney's injury to some degree. Including category D on the jury form would come the closest to approximating Mr. Oney's true exposure in the form of percentages. Damages would then be awarded based on reallocation of percentages and considerations of fairness to all parties, as described below.

It is well-settled that the principle of joint and several liability continues to apply in a maritime setting where judgment has been entered against multiple defendants. Edmunds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979). It is also established that where one defendant settles with a plaintiff before trial and the other defendants continue to trial, the claims that that plaintiff has against the nonsettling defendants are reduced by the released defendant's proportionate share of responsibility for the total obligation. McDermott, Inc. v. AmClyde, et. al., 511 U.S. 202 (1994). What

remains unsettled is, in a setting where multiple manufacturers of asbestos-containing products have been identified as having contributed to a plaintiffs injury yet only a few have been named as defendants, 1) how fault is to be apportioned among all those identified; 2) how responsibility for a judgment-proof defendant's liability should be apportioned among other identified tortfeasors; 3) how the negligence of a bankrupt tortfeasor with a trust fund in place from which a plaintiff may recover should be considered by the jury; and 4) how the negligence of a tortfeasor statutorily immune from judgment and thus never named as defendant, such as a shipyard employer, should factor into the jury's apportioning of fault and damages at trial. When read together, Edmunds and McDermott, Inc. dictate that fault is to be apportioned initially among all those identified as tortfeasors, regardless of whether they were named party to the action; and a judgment-proof tortfeasor's share of damages is to be divided proportionally among all other identified tortfeasors, to ensure that no defendant at trial pays more than its equitable share of a judgment, and to prevent punishment of those defendants who choose not to settle. David D. Jensen, *Navigating the Straits of Settlement and Insolvency: A Reconciliation of Joint and Several Liability and Proportionate Settlement under the Maritime Law,* 60 Wash. & Lee L. Rev. 623 (2003) (attached for the Court's convenience as Exhibit "A"). At least one commentator has labeled this approach "limited joint and several liability." Id. Additionally, following that approach, a jury should be permitted to apportion fault to an immune shipyard employer, though it may never have been named a party, to

ensure that no one tortfeasor bears more than its equitable share of responsibility for the damages.

## I. Adoption of a Limited Joint and Several Liability Approach to Apportion the Liability of a Defendant Immune from Judgment Among All Other Tortfeasors Is Consistent with McDermott, Inc.

While neither Edmonds nor McDermott, Inc. directly address how to apportion the share of responsibility of a tortfeasor immune from judgment among those identified in a case, together these cases provide for application of "limited joint and several liability." Jensen, at 643. Under such theory, a factfinder first allocates fault to all identified tortfeasors - named defendants, tortfeasors not named as defendants, settling defendants, and tortfeasors that are otherwise immune from judgment - and then proportionately reallocates the fault assessed to a judgment-proof tortfeasor among the other identified tortfeasors. See Id. at 644. Thus the factfinder apportions the fault of a judgment-proof tortfeasor proportionally among other tortfeasors that are not judgment-proof, including settling and nonsettling defendants and those that were never made parties. Id. Such an approach ensures that no defendant at trial pays more than its share of the judgment, replicates the allocation that would result for nonsettling defendants (after contribution) had no settlement occurred, and best preserves the parties' expectations. Id.

In McDermott, Inc., the Court did not face the issue of River Don's responsibility for the share of damages of AmClyde, a party found to be contractually immune from liability. However, the Court did recognize the appeal of a limited joint and several liability approach when it noted that the principles of joint and several liability pronounced in Edmonds would not elevate River Don's liability to include that of AmClyde, a judgment-proof party. McDermott, Inc., 511 U.S. at 211, n. 10. The Court stated that while "it might be thought that, since AmClyde is immune from damages, River Don's liability should be $1.47 million (McDermott's $2.1 million loss minus 30% of $2.1 million, the share of liability attributed to the settling defendants and McDermott)," the better approach was to view the contractual provision limiting AmClyde's liability as a "quasi settlement," Id. "Viewed as such, the proportionate credit in this case properly takes into account both the 30% of liability apportioned to the settling defendants (and McDermott) and the 32% allocated to AmClyde. This leaves River Don with $798,000 or 38% of the damages." Id. The Court was thus willing to adopt an approach like limited joint and several liability that would have held River Don liable only for its precise share of damages. Essential to the Court's reasoning was the principle pronounced in Reliable Transfer that no tortfeasor should pay more than its share of the judgment. Id. at 209, 211 n. 10.

The theory of limited joint and several liability is also consistent with the Court's statement in McDermott, Inc. that the principle of joint and several liability "can result in one defendant's

paying more than its apportioned share of liability when the plaintiffs recovery from the other defendants is limited by factors beyond the plaintiffs control, such as a defendant's insolvency" 511 U.S. at 220-21. For example, under this approach, where there are three defendants, one of whom is insolvent and thus judgment-proof, the other two defendants, rather than the plaintiff, would be forced to bear the immune defendant's responsibility for the total obligation proportionally to their relative degrees of fault. Thus, as the court noted, the two defendants would be paying more than their original apportioned share of liability. However, neither would be required to bear the entire portion of the judgment-proof defendant's responsibility alone, regardless of whether one settles before trial.

The same would apply in a situation where there are ten identified tortfeasors, six are named as defendants, and one is immune from judgment. In that case, the immune party's responsibility for the total obligation would be re-allocated among the remaining identified tortfeasors proportionally to their relative degrees of fault. Such an approach would be inconsistent with the principles announced in McDermott, Inc., namely the proportionate fault approach of Reliable transfer, the promotion of settlements without unnecessary pressure to do so, and judicial economy. Limited joint and several liability is consistent with all three. First, limited joint and several liability is consistent with the proportionate fault approach of Reliable Transfer. Essential to the McDermott Court's choice of proportionate share appointment over the *pro tanto* method was first its realization that *"pro tanto*

apportionment was more likely to result in nonsettling defendants paying more than their equitable shares of damages at trial." Jensen, supra 2, at 648. "In contrast, under proportionate share allocation, 'nonsettling [tortfeasors] pay no more than their share of the judgment.'" Jensen, supra 2, at 648, citing McDermott, Inc., 511 U.S. at 209.

> To be consistent with proportionate fault, then, an apportionment scheme should divide a judgment-proof defendant's share of damages among the settled and nonsettled codefendants as though no settlement had occurred at all. Were the damages divided among the nonsettling defendants only, the final result would run afoul of the command that 'nonsettling defendants pay no more than their share of the judgment.' Nonsettling codefendants' liabilities would increase as other defendants settle, the very evil the Court sought to avoid in adopting proportionate share *over pro tanto* allocation.

Jensen, supra 2, at 649 (emphasis added). Limited joint and several liability is thus consistent with Reliable Transfer and McDermott, Inc. in that it results in each nonsettling defendant paying only the share of damages it would have paid had all defendants proceeded to trial.

Second, limited joint and several liability is consistent with the promotion of settlement. As the

McDermott Court noted, incentives to settle cannot come at too high a price; they cannot come at the expense of nonsettling parties. McDermott. Inc., 511 U.S. at 215. Additionally, the Court noted that settling parties should be insulated from future liability. Id. at 211-212. Under a limited joint and several liability approach, both criteria are met, "as settled parties are immune from future contribution claims, and other parties' settlements do not increase or decrease nonsettlors' expected liabilities. Much like proportionate share apportionment, limited joint and several liability preserves settlement incentives, but does not provide additional incentives at the expense of other, nonsettling defendants." Jensen, supra 2, at 650.

Finally, this approach comports with judicial economy. Reallocating a judgment-proof tortfeasor's share of damages among the other defendants takes little or no additional time at trial. Further, "good faith" settlement hearings that the McDermott Court disfavored are not required, as partial settlement under a limited joint and several liability approach does not change the liabilities of nonsettling parties. Jensen, supra 2, at 650-51.

Because it best serves the three principles announced in McDermott, Inc., this Court should adopt a limited joint and several liability approach to allow a judgment-proof tortfeasor's share of responsibility for the total obligation to be borne by all other identified tortfeasors, settling and nonsettling and those named and unnamed, in proportion to their respective degrees of fault.

## II. Under a Limited Joint and Several Liability Approach, a Jury Should Be Permitted to Consider the Negligence and Fault of a Shipyard Employer in Apportioning Damages Among Defendants, Which Approach Is Consistent with McDermott.

In 1942, the National Conference on safety and health in shipyards holding contracts with the U.S. Navy and Maritime Commission met and agreed upon minimum standards to be followed in shipyards holding contracts with the two agencies. See Exhibit "B". NNSDC was represented at that meeting. The next year, the U.S. Navy Department and the U.S. Maritime Commission put into effect the "Minimum Requirements for Safety and Industrial Health in Contract Shipyards," demanding strict compliance with the same. Id. at 1. Included in the Requirements was a provision that "[i]n general, any job in which asbestos is breathed... can be done safely with segregation, use of exhaust ventilation and respirators, and periodic medical exams. Id. at 9. Additionally, the responsibility of management was considered to include the provision of a safe working environment, training of employees for safety, and establishment of an accident record. Id. at 12. Then, in a letter from the Secretary of the Navy to the Chief of Bureau of Ships, dated July 7, 1943, it was requested that "action be taken through Supervisors of Shipbuilding to effect full cooperation in this essential program of all private shipyards having Navy contracts." See Exhibit "C". Since then,

and until the adoption of workplace regulations by OSHA in 1971 regarding the use of asbestos, NNSDC systematically and deliberately failed to warn its workers of the dangers associated with exposure to asbestos despite the record being replete of documents from the Navy to the effect that shipyards must protect all workers working on Naval ships. Every claimant and co-worker who has ever been a party to the asbestos litigation in Virginia involving NNSDC and who has testified has said the shipyard never told them anything and never protected them in any way.

Though it is not named as a defendant in this action, the limited joint and several liability approach outlined above should be extended to permit the jury to consider the negligence of NNSDC, Mr. Oney's employer, when apportioning fault at trial. Plaintiff has already recovered from NNSDC under the Virginia Workers' Compensation Act or may do so if the requirements of the Act are met. Allowing the jury to consider the shipyard's negligence would not prevent her from otherwise obtaining a full recovery.

Under § 65.2-307 of the Code of Virginia, the Virginia Workers' Compensation Act (hereinafter the "Act"),

> the rights and remedies... granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other

> rights and remedies of such employee [or] his personal representative... at common law or otherwise, on account of such injury, loss of service, or death.

That is, when an employee in Virginia is injured in the performance of his duties for his employer, the Act states that his sole and exclusive remedy is against the employer, as both employers and employees are "conclusively presumed to have accepted the provisions of [the Act] respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment..." Code of Virginia § 65.2-300(A). The Act does not affect an employee's rights against third parties; it only precludes an employee from suing his employer for damages independently because of the Act. Smith v. Virginia Ry. & Power Co., 144 Va. 169 (1926). Because an employer such as NNSDC is immune from liability to its employees under the Act, the Act prevents an individual, like Plaintiff, from ever naming his or her employer as a defendant in a civil suit like the one before this Court, regardless of the degree of negligence or fault attributable to the employer. To ensure compliance with McDermott and the principle of Reliable Transfer that no defendant should pay more than its equitable and proportionate share of the damages, this Court should allow the jury to consider the negligence of the shipyard when apportioning damages among the named defendants.

When faced with a partial settlement, the McDermott Court adopted a proportionate share

approach to resolve the issue of whether in admiralty cases "the liability of... nonsettling defendants should be calculated with reference to a jury's allocation of proportionate responsibility, or by giving them a credit for the dollar amount of a settlement entered into before trial." 511 U.S. at 205. Under that approach, any amount paid in settlement extinguished any claim that the injured party had against the released defendant and also diminished the claim that the injured party had against the nonsettling defendants by the released defendant's proportionate share of responsibility for the total obligation. Id. at 209, 217. In adopting this approach, the Court examined the relationship between joint and several liability and its adoption of proportionate share apportionment, noting that joint and several liability can result in one defendant's paying more than its apportioned share of liability when the plaintiffs recovery from other defendants is limited by outside factors beyond the plaintiffs control, such as a defendant's insolvency. Id. at 220-21. In such a case, the Court reasoned that the other defendants, rather than the plaintiff, should remain responsible for the plaintiffs inability to recover from the insolvent defendant. Id. Conversely, the Court asserted that a plaintiffs decision to settle with a particular defendant did not constitute a limitation on the plaintiffs recovery by outside forces, but rather by its own agreement to settle. Id. As such, the Court saw no reason to allocate any shortfall in the plaintiffs recovery from the settling defendant to the other defendants, who were not parties to the settlement. Id. at 221.

Here, Plaintiffs recovery from NNSDC through the Act is limited only in amount. Thus, NNSDC may, for purposes of apportioning fault and damages, be analogized to a settling defendant whose share of responsibility reduces the claims that the plaintiff has against the other parties, from whom the plaintiff has not yet recovered, by the released entity's proportionate share of responsibility. Because Plaintiff has already recovered from the shipyard, the jury should be permitted to consider its share of fault to the benefit of all named defendants.

However, to the extent that Plaintiffs recovery against the shipyard is limited by factors beyond her control, in that she is forced to accept the terms of the Act and unable to proceed to trial, under a limited joint and several liability approach, a jury should still be permitted to first apportion fault to all negligent actors, including the shipyard, and then reallocate the responsibility of those tortfeasors immune from judgment among the remaining defendants proportionately to their degree of fault. No one defendant should be required to bear a judgment-proof defendant's responsibility for the total obligation. Permitting the jury to consider the negligence of the shipyard without entering judgment against it would not prejudice Plaintiff, as she has already recovered from the shipyard or can. Such an approach would serve to ensure equitable apportionment among all named defendants.

In Garlock Sealing Technologies. LLC v. Little, 270 Va. 381, 388, 620 S.E.2d 773, 777 (2006), the Supreme Court of Virginia, in dicta, did

maintain reservations regarding whether "federal maritime principles permit a court to enter a judgment reflecting a jury's apportionment of damages among entities who were never named defendants in the lawsuit before the court and from whom plaintiff has received no compensation for his injuries." (emphasis added). These reservations do not apply to this case. Here, Plaintiff has already received compensation from the shipyard by virtue of the Act. The only reason Plaintiff failed to name the shipyard as a defendant was the immunity granted it under the Act and the provision stating that recovery under the Act serves as the sole remedy against the employer. Because the shipyard is a negligent party from whom Plaintiff has already recovered, the named defendants, including John Crane, should be permitted to instruct the jury to consider the degree of negligence and fault of the shipyard when apportioning fault and damages at trial.

## CONCLUSION

For the foregoing reasons, John Crane respectfully asks this Court to 1) apportion any damages awarded to Plaintiff at trial among the defendants such a judgment-proof defendant's share of damages is divided among all defendants, both settling and nonsettling, proportionately to their degree of fault; and 2) permit the jury, when apportioning fault and damages, to consider the negligence and fault of NNSDC, the negligent shipyard employer.

Respectfully submitted,

**JOHN CRANE, INC.,**

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of February, 2007, a true and accurate copy of the foregoing was emailed and sent via email and U.S. Mail, postage prepaid, to:

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60 WLLR 623

60 Wash. & Lee L. Rev. 623

Washington and Lee Law Review
Spring, 2003

Note

# *623 NAVIGATING THE STRAITS OF SETTLEMENT AND INSOLVENCY: A RECONCILIATION OF JOINT AND SEVERAL LIABILITY AND PROPORTIONATE SETTLEMENT UNDER THE MARITIME LAW

David D. Jensen [Fna1]
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## *624 I. Introduction

Who pays for a judgment-proof defendant? Does a plaintiff's interest in full compensation outweigh a defendant's interest in paying only for the harm that it caused? Multidefendant litigation raises one more question: What happens when one defendant settles, one goes to trial, and a third winds up judgment-proof? [FN1] The law should encourage litigants to resolve disputes, but should it do so to the detriment of defendants that demand their day in court?

**DEFENDANT'S EXHIBIT A**

The questions in the preceding paragraph do not have easy answers; in fact, the Third Restatement of Torts devotes an entire volume solely to the issue of damage apportionment. [FN2] This Note considers only one aspect of the tension between comparative fault and full compensation: reallocating uncollectible damages among parties to a lawsuit. This aspect lacks a clear consensus. For example, the Third Restatement suggests no fewer than five schemes for allocating a judgment-proof defendant's share of damages among parties. [FN3] The significance of this issue is apparent when one considers the *625 numerous high-profile lawsuits in which nominally responsible defendants have paid grossly disproportionate damages to plaintiffs. For example, in 1987 the Supreme Court of Florida imposed 86% of a damages award against Walt Disney World, which was itself only 1% at fault for the plaintiffs injuries. [FN4] The plaintiffs husband, 85% liable for her injuries, was immune to suit, [FN5] so Walt Disney World bore both its 1% share and the husband's 85% share of the plaintiffs $750,000 award. [FN6]

This Note examines a topic narrower than just the reallocation of uncollectible portions of plaintiffs' awards. Specifically, this Note discusses the reallocation issue in the context of partial settlements perfected under the maritime law, The maritime law is an excellent area of inquiry because it allows exploration of the interplay between "pure" joint and several liability and "pure" comparative fault. [FN7] Furthermore, the bounds of one defendant's responsibility for another's inability to pay are unclear under the current maritime jurisprudence. Although this issue is admittedly

narrow, it reaches wider in that its resolution requires one to reconcile tensions between joint and several liability and proportionate fault.

Admiralty and maritime actions fall under the jurisdiction of the federal courts, [FN8] Approximately 6.5% of tort claims in federal courts concern maritime law. [FN9] Maritime jurisdiction applies to torts that both occur on the navigable waters of the United States and bear a significant relationship to traditional maritime activity. [FN10] Because the maritime law is a distinct pronouncement*626 of "federal common law," [FN11] maritime decisions can be highly influential in tort law's development. [FN12] For example, the United States Supreme Court's decision in East River Steamship v. Transamerica Delaval, Inc., [FN13] articulating the grounds and rationales of the economic loss rule, [FN14] has strongly influenced both state and federal causes of action. [FN15]

Recently, the Court has modified the maritime law by adopting comparative fault, [FN16] retaining joint and several liability, [FN17] and applying "proportionate share" apportionment when parties partially settle claims. [FN18] Notwithstanding *627 these developments, the precise interplay of these principles in the arena of judgment-proof defendants remains unclear. [FN19] On the one hand, joint and several liability allows a plaintiff to recover all of its damages from any concurrent tortfeasor and thus makes codefendants liable for a judgment-proof defendant's share of damages. [FN20] On the other hand, comparative fault and proportionate share apportionment limit the liability of nonsettiing

defendants to their proportionate shares of the plaintiffs damages. [FN21] The Third Restatement describes joint and several liability's imposition of the risk of insolvency on codefendants as "difficult to square with comparative responsibility." [FN22]

Though this issue is not unique to the maritime law, it is one that many states do not face because of widespread legislative modification of joint and several liability principles at the state level in recent years. [FN23] The issue of apportioning a judgment-proof defendant's share of damages Is often nuN at the state level because tort reform has eliminated the issue or provided statutory guidance for its resolution. [FN24] However, the maritime law still incorporates "pure" joint and several liability. [FN25] Moreover, the Supreme Court has stated that the first goal of the maritime law in apportioning damages is full compensation to the plaintiff. [FN26] The rub, then, is doing so In a manner that is fair to all parties.

**628* Part II of this Note reviews two influential maritime decisions from the Supreme Court, Edmonds v. Compagnie Generate Transatlantique [FN27]and McDermott, Inc, v. AmClyde, [FN28] and articulates the exact problems their holdings present when defendants are judgment-proof. Part III lays the groundwork for solving these problems by arguing that partial settlements reflect the potential damages, not the actual damages, awarded among parties at trial. Part IV then suggests that the mutual embrace of pro rata apportionment and joint and several liability compels proportionately reallocating judgment-proof defendants' shares of

damages to all defendants and imputing those shares to prior settlements, Furthermore, Part IV details the operation of this solution, labeling the approach "limited joint and several liability." Part IV then analyzes limited joint and several liability in iight of the objectives and bases of damages allocation pronounced by the Court. Both Parts III and IV incorporate mathematical abstractions to demonstrate the effect of various apportionment schemes on the parties to a suit. Part V analogizes the approach to state and federal decisions addressing the reallocation of individuals' joint obligations. Part VI concludes that the end is in fact the beginning: confusion over the apportionment of damages owes to the frame of reference, not the intractability of the problem.

## II. The McDermott and Edmonds Problem: The Judgment-Proof Defendant

### A. Edmonds v. Compagnie Generale Transatiantique: Continued Vitality for Joint and Several Liability

Edmonds v. Compagnie Generale Transatlantique begins this Note because it was in Edmonds that the Court concluded that joint and several liability survived as a mode for fully compensating plaintiffs, notwithstanding two intervening legal developments: comparative fault and immunity for employers. In Edmonds, a longshoreman recovered a $100,000 verdict against the stevedoring company that employed him and the owner of the ship on which he was working. [FN29] Because federal law made the stevedoring company immune from the

longshoreman's claim for damages, [FN30] the Supreme Court ***629** faced the task of reallocating this company's share of damages. [FN31] Moreover, recent amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA) [FN32] barred contribution claims against the employer. [FN33] The U.S. Court of Appeals for the Fourth Circuit had reasoned that Congress's disallowance of contribution against the stevedoring company, in conjunction with its allowance of claims against the shipowner, dictated a strictly proportionate damages allocation: the preclusion and allowance could "be harmonized only if read in apportioned terms." [FN34] Thus, the Fourth Circuit had held that the shipowner was liable only for its proportionate share of the plaintiffs damages. [FN35]

Reversing the Fourth Circuit, the Court began its decision by noting that Congress had amended the LHWCA in response to rulings of the Court. [FN36] Nothing in the legislative history of the LHWCA amendments indicated that Congress had intended to change the common law rule of joint and several liability. [FN37] Furthermore, the Court found that Congress contemplated the continuation of joint and several liability in a longshoreman's claims against a negligent shipowner. [FN38] Though "[s]ome inequity appears inevitable in the present statutory scheme," that inequity does not indicate that Congress intended to place the burden on the injured longshoreman "whom the [LHWCA] seeks to protect." [FN39]

The Court also considered overruling joint and several liability on its own accord. Finding that Congress had understood joint and several principles to stipulate full recovery from a negligent shipowner, the Court declined to modify the principle. The Court reasoned that such a modification "wouid effectively alter the statute by causing it to reach different results than Congress envisioned." [FN40] When Congress acts on conditions created by the Court ***630** itself, the Court is "not as free as [it] would otherwise be" to change those conditions. [FN41]

In the end, Edmonds resolves tension between proportionate fault and joint and several liability in favor of full compensation for the plaintiff. [FN42] Though the law favors the proportionate allocation of judgments among defendants, a plaintiffs interest in full recovery outweighs a defendant's interest in limiting its exposure. [FN43] Joint and several liability remains the course, even though it sometimes results in grossly disproportionate judgments against defendants.

### B. McDermott, Inc. v. AmClyde: Enter the Proportionate Settlement

Fifteen years after Edmonds, the Court faced a somewhat different juxtaposition: comparative fault, joint and several liability, and partial settlement. McDermott, Inc. sued a crane manufacturer (AmClyde), the manufacturer of a hook (River Don), and three manufacturers of steel slings for property damage. [F1M441 Before trial, the sling defendants settled with McDermott for $1 million. [FN45] The jury trial resulted in a $2.1 million verdict, with

liability apportioned 32% to AmClyde and 38% to River Don. [FN46] The plaintiff and the sling defendants were collectively 30% responsible. [FN47] At trial, the district court apportioned damages under a pro rata approach, entering judgment for 32% of the $2.1 million verdict against AmClyde ($672,000) and 38% against River Don ($798,000). [FN48] Under the district court's judgment, McDermott's total recovery was $2,470,000: the $1 million settlement and the $1,470,000 against AmClyde and River Don.

When McDermott made its way to the U.S. Court of Appeals for the Fifth Circuit, the court reversed the district judge. [FN49] First, the Fifth Circuit found AmClyde immune to McDermott's action by operation of a prior contract ***631** between the two, [FN50] Second, the Fifth Circuit apportioned the judgment "pro tanto," reducing it "dollar for dollar" by the amount of McDermott's prior settlement. [FN51] Because the damages taxed against all defendants at trial were $1.47 million ($2,1 million reduced by the 30% fault apportioned to plaintiff McDermott and the settled defendants), the Fifth Circuit held that McDermott could recover a maximum of $470,000 ($1.47 million less the $1 million settlement). [FN52]

The Supreme Court granted certiorari; the issue on appeal was damages apportionment in cases of partial settlement. [FN53] Should a plaintiff recover the "net" of the verdict less the amounts received in settlement [FN54]-making the nonsettlors liable for all of the judgment that is not yet paid? Or instead, should the plaintiff recover only the nonsettling

defendant's comparative share of damages [FN55]-in this instance resulting in the plaintiff recovering a sum greater than the verdict?

The Court began its decision with the Second Restatement of Torts. [FN56] The Restatement suggested three possible allocation mechanisms. The first allocation rule, "pro tanto with contribution," reduces the nonsettling defendants' liability by the amount of the settlement. Defendants paying more than their equitable shares of damages are free to pursue contribution from other defendants. [FN57] The second apportionment mechanism, "pro tanto without contribution," reduces the nonsettling defendants' liability by the amount of the settlement, but does not allow contribution. Nonsettling defendants are liable for the full damages awarded to the plaintiff, reduced by any settlement amounts. [FN58] The Court unanimously adopted the final rule, "pro rata" allocation, though it elected to refer to it as "proportionate share" allocation. [FN59]

Under the proportionate share approach, a defendant that settles extinguishes its own future liability and reduces other defendants' liabilities by its "equitable share" of damages. [FN60] Nonsettling defendants remain liable for their ***632** own proportionate shares of damages. [FN61] River Don's assessed liability was 38%, so River Don should pay 38% of the $2.1 million verdict. [FN62] The Fifth Circuit had also held that AmClyde was immune to McDermott's claim for damages because of an agreement between the two that waived liability. [FN63] The parties did not raise the issue of River Don's responsibility for AmClyde's share of damages,

and the Court did not consider it-nor did it consider the liability of other parties for AmCiyde's share. [FN64]

Three considerations were "paramount" in the Court's selection of an apportionment scheme: (1) consistency with the principle of proportionate fault, (2) promotion of settlement, and (3) judicial economy. [FN65] With regard to judicial economy, the Court found pro tanto with contribution inferior to the other two approaches because it encourages additional contribution litigation. [F1M66] Moreover, because pro tanto with contribution leaves settling defendants open to future contribution claims, the Court felt that it would not encourage litigants to settle. [FN67]

Deciding between the proportionate share and pro tanto without contribution mechanisms, the Court focused on the rules' consistency with comparative fault. The Court reasoned that the proportionate share approach is more consistent with proportionate fault because, unlike pro tanto without contribution, nonsettling defendants never pay more or less than their equitable shares of damages. [FN68] Furthermore, the Court reasoned that, because trial uncertainty and the plaintiffs desire for "war chest" funds normally reduce settlement values to less than the amounts of verdicts rendered at trial, using pro tanto apportionment without contribution likely would result in settling defendants paying less than their equitable shares of damages. [FN69] Though "good faith" hearings could help ensure that partial settlements are accurate reflections of ***633*** a defendant's liability, the Court concluded that these

hearings would not "fully remove" potential inequity because experience in other courts showed that they are normally "cursory." [FN70] That a plaintiffs success at trial is uncertain further compounded the use of hearings. [FN71]

The Court felt that pro tanto without contribution would encourage early settlement by allowing early-settling defendants to pay less than their equitable shares of damages. [FN72] At the same time, this incentive to settle is at the expense of nonsettling defendants, who remain liable for all damages less the amounts of the low, early settlements. [FN73] While public policy should encourage settlement, doing so at the expense of nonsettling parties is "too high a price in unfairness." [FN74] The Court found that other factors-the cost of litigation, the desire to avoid uncertainty, and the maintenance of commercial relationships-normally provide "sufficient" incentives to settle. [FN75]

The Court also concluded that proportionate share allocation better serves judicial economy. The "potential for unfairness" in pro tanto without contribution (in that some defendants settle for less than their shares because other defendants have "deep pockets") necessitates "good faith" hearings. [FN76] These hearings require district courts to predict a settling defendant's "fair share" of damages long before trial. [FN77] Though courts must determine the relative faults of parties at some point, the Court felt that reserving the determination for trial would save judicial time for two reasons. [FN78] First, all parties may settle before trial, negating the need for any

determination. [FN79] Second, determining settled parties' relative faults at trial, in addition to determining the fault of the nonsettling defendants, may consume "little or no additional trial time." [FN80] The ***634** nonsettling parties likely need to describe the role of all defendants "to provide context for the dispute." [FN81]

Ultimately, the Court came to consider the interplay between joint and several liability in Edmonds and its adoption of proportionate share apportionment. The Court maintained that "no tension" exists between joint and several liability and proportionate share allocation, just as the adoption of comparative fault did not abrogate joint and several liability principles. [FN82] Edmonds "merely reaffirm[s]" joint and several liability, which can "result in one defendant] paying more than its apportioned share of liability when the plaintiffs recovery from other defendants is limited by factors beyond the plaintiffs control, such as a defendant's insolvency." [FN83] The Court went on to state: "When the limitations on the plaintiffs recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall." [FN84] A settlement is not a limitation on the plaintiffs recovery "by outside forces, but by [the plaintiffs] own agreement to settle." [FN85] Thus, Edmonds "did not [even] address the issue in this case, the effect of a settlement on nonsettling defendants." [FN86]

C. The Collision over Judgment-Proof Defendants

The progress of knowledge sometimes requires that we look not to what has been said, but rather, to what those statements discuss in the first place. [FN87] Arguably, the McDermott Court's adoption of pro rata apportionment creates *635 more questions than it answers when some defendants can't pay. [FN88] This Note uses the following hypothetical example to help clarify the nature of the problem and its resolution. Suppose that Adam owns a crane that Becky manufactured and sold directly to Adam. This crane uses steel cable that Cindy manufactured and also sold to Adam. At the time Adam bought the crane and cable, both Becky and Cindy recommended the use of Cindy's steel cable with Becky's crane. After the sale, Cindy realizes that her steel cable is very susceptible to corrosion and should not be used in waterfront applications. Cindy notifies Becky, but not Adam. Becky, in turn, realizes that she has advised Adam to use Cindy's cabling on the crane and warns Adam to replace the Cindy-manufactured cable with one of several alternate brands immediately. Adam ignores Becky's warning, and two years later a corroded cable breaks and severely injures Paul, a longshoreman in Adam's employ. Paul sues Adam, Becky, and Cindy, and all three defendants assert that Paul is comparatively negligent. In addition, Adam asserts immunity under LHWCA as a defense. Before trial, Becky settles with Paul for $250,000. At trial, the jury apportions liability 40% to Adam, 30% to Becky, and 20% to Cindy, with 10% comparativefault to Paul. The jury awards $1 million in damages. Were there no settlements and no claims of immunity, the

mechanics of contribution would make Adam pay $400,000, Becky $300,000, and Cindy $200,000. [FN89] However, because Adam is judgment-proof, Becky and Cindy are jointly liable for Adam's share of the damages ($400,000). Normally, the question would be one of how to divide Adam's share of damages between Becky and Cindy. However, Becky has settled and is no longer liable as a party. Does Cindy, herself only 20% responsible for Paul's injuries, pay 60% of Paul's damages? Or does Paul's settlement with Becky extinguish any joint liability on Cindy's party, leaving her responsible only for her 20%?

The holdings of McDermott and Edmonds, representing the amalgamation of comparative fault and joint and several liability, stand ambiguous to the resolution of this problem. Though the decisions advocate joint and several liability when factors beyond the plaintiffs control limit recovery, [FN90] ***636** McDermott also provides that a plaintiffs act of settlement is not such an "involuntary" factor. [FN91] In a footnote discussion, the McDermott Court noted that one party's inability to pay damages "might be thought" to make the remaining at-trial defendants liable for that party's share of damages. [FN92] However, the Court then stated that it felt the "best way of viewing" the contractual provision limiting AmClyde's prospective liability was as a "quasi settlement in advance of any tort claims," thus not implicating the other defendants' obligation to cover a judgment-proof defendant's share of damages. [FN93] Looking to the allocative principles at work in the Court's decisions, this Note now delves into the legal views underlying the

Court's joint and several liability and pro rata apportionment pronouncements. The amalgamated approach labeled limited joint and several liability develops from this framework of underlying principles.

## III. Partial Settlements as Proportionate Pieces of the Expected Pie

### A. Settlements as Expected (vis-a-vis Actual) Damages

Partial settlements are not "dollar for dollar" equivalents of a settling defendant's actual share of damages at trial, [FN94] and the Court recognized this fact in choosing the proportionate share rule. [FN95] According to the McDermott Court, the disparity between pretrial settlement amounts and damages awarded at trial results from trial uncertainty and the plaintiffs interest in obtaining "war chest" funds to finance continued litigation against remaining defendants. [FN96] Commentators have identified a number of additional factors that discount settlements: litigation costs, risk aversion, Informational inaccuracies, the structure and timing of settlement offers, and parties' knowledge ***637** of other settlement offers and of other parties' financial solvency. [FN97] The time value of money-the idea that a dollar today is worth more than a dollar tomorrow-also discounts settlements. [FN98] To a litigant, then, a settlement payment intrinsically outweighs a verdict of equal amount because the settlement payment is certain (as opposed to uncertain) and immediate (as opposed to prospective). [FN99]

While a defendant's settlement may not accurately reflect the total damages assessed against the defendant at trial, the settlement still reflects the parties' expectations about the individual defendant's probable obligation to the plaintiff. [FN100] Thus, the settlement represents the expected value of the settling defendant's share of damages at the time of settlement. [FN101] Close analysis reveals that the Supreme Court's concern about the "unfairness" of pro tanto allocation stems from the disparity between actual and expected damages. [FN102] Because of both the uncertainty of success at trial and the plaintiff *s*638* interest in obtaining proceeds immediately, the Court felt that settlements do not reflect the actual damages that juries award at trial. [FN103]

The distinction between viewing settlements as reflective of actual damages and viewing them as reflective of expected damages is crucial. Using the dollar amount of a verdict as the measure of a defendant's responsibility yields systemically biased results because (among other reasons) many settled claims would never ultimately result in verdicts for plaintiffs. Because many suits never result in verdicts at all-there are summary judgment dismissals, settlements, and defense verdicts-saying that any particular claim would have netted X-dollars at trial presupposes too much. If settlements do not reflect actual, at-trial damages, then deducting settlement amounts from verdicts results in disproportionate (and thus, unfair) allocations of damages to nonsettling defendants. [FN104] Significantly, even some jurisdictions that use pro tanto allocation recognize that damages expected at

the time of a settlement may differ substantially from the actual damages found at trial. [FN105] Thus, to effectuate a division of damages that is actually proportionate to fault, the dollar amount of pretrial settlements cannot be the "ruler" in a post-verdict entry of judgment against nonsettling defendants.

B. Allocating Discounting Factors Among the Parties

The real unfairness of pro tanto apportionment is that it places the risk of deviation between actual and expected damages not on the parties to a settlement agreement, but rather, on the defendants that are not parties to the agreement. [FN106] A return to the previous hypothetical illustrates this, [FN107] although **639* for simplicity this discussion assumes that Adam is not judgment-proof. If the case goes to trial and no one settles, Adam pays $400,000, Becky pays $300,000, and Cindy pays $200,000. [FN108] However, before trial occurs, no one knows: (1) what verdict the jury will return, (2) how the jury will allocate fault among the parties, and (3) whether any other party will actually be able to pay damages if a court enters judgment against it. Because of these uncertainties, suppose that Adam and Paul settle before trial for $300,000. Trial results in the aforementioned $1 million verdict with liability apportioned 40% to Adam, 30% to Becky, and 20% to Cindy, In a pro tanto regime, Becky and Cindy together pay $600,000: the $900,000 "net" verdict less the $300,000 that Adam paid in settlement. Thus, Becky pays 60% (30%/30% + 20%) of the $600,000, or $360,000: $60,000 more than she would have paid if all parties had proceeded to trial.

In contrast, under the proportionate share rule Becky pays only her share (30%) of the verdict, $300,000: the Adam-Paul settlement does not affect Becky's liability.

Discounting factors mean that settlements typically are lower than damages awarded at trial; thus, a regime of pro tanto apportionment generally increases nonsettling defendants' expected liabilities. [FN109] On the other hand, if the settling parties underestimate Adam's relative fault or the amount of damages, then the Adam-Paul settlement might actually benefit Becky under pro tanto allocation. If the jury awards $800,000 and finds Adam 20% responsible, Becky 30% responsible, and Cindy 40% responsible, Becky pays $240,000 in the absence of a settlement agreement. Because Adam and Paul have settled for $300,000, under pro tanto apportionment Becky and Cindy are only liable for $420,000: $720,000 ($800,000 less 10% comparative negligence)*640 less the $300,000 prior settlement. Becky pays 42.9% (30%/30% + 40%) of $420,000, or $180,000, which is $60,000 less than she would have paid had Adam and Paul not settled. Thus, in this situation, the Adam-Paul settlement agreement benefits Becky, instead of increasing her liability or allocating the surplus of the bargain back to Adam.

The source of the inequity between pro tanto and pro rata allocation is the fundamental difference between expected loss and actual loss: settled defendant Adam's expected loss is subtracted from the actual verdict. [FN110] Proportionate share apportionment, on the other hand, subtracts Adam's actual share of damages (40%) from the verdict.

Becky's at-triai liability remains the same under a proportionate share system.

Based on the foregoing discussion, we can say that the amount a defendant pays at trial (assuming there are no settlements) is a function of the damages found by a jury and that defendant's relative culpability. Thus:

$$Pa = D \cdot fa$$

where Pa is the amount that defendant a pays, D is the total amount of damages awarded by a jury, and *fa* is a's proportionate share of fault. If damages are $100 and a is 50% at-fault, then a will pay 50% of $100, or $50. On the other hand, the amount the parties expect a to pay at trial is:

$$E[Pa] = E[D] \cdot E[fa] \cdot pa \cdot r$$

where E[Pa] is a's expected payment, E[D] is the expected amount of total damages, *E[fa]* is a's expected share of fault, pa is the probability of prevailing against a, and r is the discount rate applied to the future payment to reflect the time value of money. [FN111] Thus, if the parties correctly expect damages to be **641* $100 and correctly expect a's share of fault to be 50%, then the present value of the claim depends on the probability that the plaintiff can prevail at all and on the discount rate applied to reflect uncertainty. A 0.9 chance of prevailing on the merits and a discount rate of 0.8 means that the present value of a's future claim payment is $36 (E[D] . E *[fa]* . pa , r = $100 . 0.5 . 0.9 . 0.8).

Assuming instead a situation with two defendants, a and b, the total payments made by the defendants (P) are:

$$P = D \cdot fa + D \cdot fo$$

And the expected value of the total payments to the plaintiff is:

E[P] - E[D] . E[/3] . pa. r + E[D] .
E[ft>] . pb . r

How do things change if someone settles? If b settles and the only defendants to the suit are a and b, then a pays the total judgment against the defendants, less the settlement offset:

Pa = P - offset = D . fa + D . /b – offset

Assuming that plaintiffs never settle for less than, and defendants never pay more than, the expected value of claims, [FN112] defendant b's settlement will be:

E[Pb] = E[D] . E[/b] . pb . r

In other words, after discounting the anticipated award to reflect uncertainty and the time value of money, the parties will not agree to a settlement that is more or less than the present value of the amount they actually expect to change hands at trial. Under a pro tanto regime, the court offsets this settlement amount from the payment made by the remaining defendant:

Pa = P - E[Pb] =
D . (fa + *fb)* - E[D] . E[/b] . pb . r

***642** Assuming that the parties' expectations regarding damages and proportionate fault are accurate (that is, E[D] = D and E[/b] = *fb),* then we can simplify a's payment as:

$$Pa = P - E[Pb] = D \cdot fa + fb \cdot (1 - pb \cdot r)$$

At trial, a will pay all of the damages attributed to it (D . fa) and also will pay the portion of b's damages not paid by b in settlement due to uncertainty (D , *fb* . (1 - pb . r)). Thus, if there is a 0.9 chance of prevailing against b and a 0.8 discount rate applied to the settlement payment, then a will pay 28% (1 - .72) of the amount that b would have paid at trial (D . fb). Defendant b's settlement with the plaintiff thus increases a's at-trlal payment to the tune of D . *fb* . (1 - pb . r).

If projections regarding damages or proportionate fault prove inaccurate, the at-trial defendant similarly bears the burden:

$$Pa = P - E[Pb] =$$
$$D \cdot (fa + fb) - E[D] \cdot E[fb] \cdot pb \cdot r$$

Thus, if the pre-trial expectations are that a and b are equally liable for a $100 obligation, the probability factor is the aforementioned 0.9, and the discount rate is the aforementioned 0.8, then b will pay up to $36 (E[D] . E *[fb]* . pb . r = $100 . 0.5 . 0.9 . 0.8) in settlement. However, if a factfinder apportions 60% of the fault to b and awards $120 in damages, then besides a's share of the judgment (D . fa = .4 . $120 = $48), a will also pay *D* . *fb* - E[D] . E[fb] . pb . r, or the difference between b's at-trial share (D . *fb* = $120 . 0.6 = $72) and what b paid in settlement (E[D] . E[fb] . pb . db = $100 . 0.5 . 0.9 .

0.8 = $36). Here, a pays $84 when it is but 40% liable for a $120 judgment.

In contrast, the pro rata rule uses b's actual share of damages as the measure of offset. Thus, in a pro rata regime, a's at-trial payment is:

$$Pa = P - \text{offset} = P - Pb =$$
$$D.fa + D,fb - D./b = D.ft$$

What does it all mean? It means that the end-result difference between pro tanto and proportionate share apportionment is whether nonsettling defendant a pays the shortfall between b's expected and at-trial shares of damages, represented as D . *fb* - E[D] . E[/t>] . pb . r.

Once one understands the choice between the pro tanto and pro rata rules as a choice between the setoff of expected versus actual damages, McDermott's selection of proportionate share apportionment supports two propositions. First, the selection shows that settlement reflects a party's expected liability at trial. Because expectations and actualities differ, [FIM113] a ***643*** settlement with a defendant for expected damages eliminates ail damages that would be taxed to the settling defendant at trial. [FM114]

Second, the result of proportionate share allocation is that partial settlements limit joint and several liability's application. [FN115] Under a pro tanto scheme, nonsettling defendants are responsible for the entire amount of a judgment, less a credit for the amounts of the settlements. Substantively, pro tanto apportionment results in

nonsettling defendants remaining jointly liable in that they may be forced to pay settled defendants' bargained-away shares of uncertainty. Under proportionate share apportionment, the plaintiffs voluntary act of partial settlement completely excuses the settling defendant by barring contribution. Thus, the liability for the share of damages that would go to the settling party becomes several, while the nonsettlors remain jointly liable for their collectively allocated shares of damages. [FN116] The risk of inaccurate settlement lies with the parties making the settlement; as the McDermott Court stated, "nonsettling defendants pay no more than their share of the judgment."

## IV. Fulfilling Expectations: Imputing Uncollectible Shares to Prior Settle ments

### A. Limited Joint and Several Liability

A plaintiff's act of partial settlement is a limitation on recovery within the plaintiffs control; thus, it destroys the joint and several relationship among the remaining defendants. [FN118] Nevertheless, a tortfeasor's inability to pay damages is beyond the plaintiffs control, so other defendants must cover the judgment-proof defendant's shortfall. [FN119] Thus, when both voluntary and involuntary ***644** factors limit a plaintiffs recovery, the logically consistent solution calls for an amalgamation of joint liability and several liability: the nonsettling tortfeasors remain jointly and severally liable with respect to the involuntary limitation on recovery, but the nonsettling defendants are only severally liable for the voluntary factors that limit recovery.

Stated differently, a court should apportion damages to replicate the allocation that would result for the nonsettlors (after contribution) had no settlement occurred. The court never enters judgment against the settled parties, but instead divides the judgment-proof defendant's share of damages among all of the defendants that are not judgment-proof. The court presumes that the prior settlements incorporated the settling defendants' shares of the judgment-proof defendant's shortfall. For simplicity, this Note labels this method of damages apportionment "limited joint and several liability."

Though this approach reconciles the inherent conflict that occurs when joint and several liability's application depends on whether limitations are "voluntary" or "involuntary," [FN120] the chief advantage of this approach is that, properly applied, it best preserves the parties' expectations. Defendants that proceed to trial do not pay more simply because other defendants settled. [FN121] Significantly, the Third Restatement of Torts essentially adopts this approach for systems of "pure" joint and several liability, though in a somewhat different form.

Under the limited joint and several liability approach, a factfinder first allocates fault to all parties-litigating defendants, defendants that have settled, defendants that are insolvent, and defendants that are immune to judgment-and then proportionally reallocates the fault assessed to a judgment-proof defendant among the other defendants. The earlier hypothetical ***645** example

illustrates this apportionment scheme. [FN122] If all parties proceed to trial, Adam, Becky, and Cindy are jointly and severally liable for $900,000. If Paul collects the $900,000 judgment from Becky, Becky will attempt to recover $600,000 from Adam and Cindy, However, because Adam is immune to Paul's claim, only Cindy can pay. Under the "pure" joint and several scheme of the maritime law, Becky and Cindy must collectively pay the damages assessed to all defendants. Thus, the court's first step is to allocate the $900,000 between Becky and Cindy.

Becky and Cindy collectively bear 50% of the total allocated fault. Compared to one another, Becky bears 60% (30%/50%) responsibility and Cindy bears 40% (20%/50%) responsibility. Becky will collect $360,000 (40% of $900,000) from Cindy, so Becky will, in the end, pay a net of $540,000 (60% of $900,000 or $900,000 - $360,000).

When a court adjudicates a partially settled suit, it should render judgments against the nonsettling defendants to replicate this result. If Cindy had settled with Paul instead of proceeding to trial, then the court should not enter the $900,000 joint and several judgment against Adam, Becky, and Cindy, but instead should enter judgment against Becky for the amount she would have ultimately paid: $540,000. Thus, Becky pays her own share of the damages ($300,000) plus her share of judgment-proof Adam's damages ($240,000).

The Third Restatement achieves a close result by removing the judgment-proof defendant from the factfinder's damage apportionment. [FN123] In the

hypothetical example, the jury would allocate fault among only Becky, Cindy, and Paul. However, because the risk of a defendant being judgment-proof falls solely on the defendants in a "pure" joint and several regime, the Restatement suggests that a factfinder first consider the fault of ail defendants (judgment-proof or not) to determine the plaintiffs comparative responsibility. [FN124] The factfinder then re-considers the fault among only the defendants, but without regard to the judgment-proof defendant. [FN125] Thus, the jury would consider ***646** Paul's fault relative to Adam, Becky, and Cindy and find Paul 10% comparatively at-fault. Next, the jury would consider the split of fault between Becky and Cindy only. Presumably, the jury would find Becky and Cindy culpable in the same proportions, so they would still pay $540,000 and $360,000, respectively, in the end.

However, removing a judgment-proof defendant from the jury's allocation of fault can be problematic. The reporters' note to the Restatement admits that "[i]n theory, it might be preferable to submit immune parties for an assignment of responsibility," but cites "administrative inefficiencies entailed" as a weightier, countervailing interest. [FN126] Specifically, the "administrative inefficiencies" are the costs associated with "discover [ing] and tryjing] the responsibility of a nonparty." [FN127] However, considerations that the Restatement either does not consider or does not fully consider weigh in favor of inclusion: the uncertainty of whether or not a party will become judgment-proof, the need for the

allocation in other contexts, and an accurate allocation by the jury in the first instance.

To start, the Restatement approach is not a "one size fits all" garment. A plaintiff may be litigating against three joint defendants, but suppose one files for bankruptcy during or after trial. At such a late point, simply removing this defendant's share from the factfinder's allocation is impossible; the choice facing the court is reallocation or retrial. [FN128] Reallocation, a matter of arithmetic, is clearly preferable to trying the entire case all over again. Moreover, what if a defendant with a bankruptcy stay loses that stay? [FN129] If codefendants have paid an outstanding judgment that does not consider the fault of the previously judgment-proof defendant, ancillary contribution litigation must determine the liability of that defendant anew.

***647** But even when a bankrupt defendant does not lose its stay, codefendants may attempt to recoup that defendant's share of the damages by asserting contribution claims in the defendant's bankruptcy proceedings. [FN130] Clearly, determining the judgment-proof defendant's share of damages will expedite the joint tortfeasors' contribution claims. Additionally, other practical considerations weigh in favor of including a judgment-proof defendant in a factfinder's liability allocation. A shipowner, immune to its employees' tort claims by operation of LHWCA, may assert an indemnification claim for "maintenance and cure" benefits paid to its employee. [FN131] In such an instance, whether or not the shipowner was itself negligent is relevant to the indemnity action because it can negate or limit

recovery; [FN132] making this determination at trial can avoid unnecessary litigation in the future. [FN133]

Finally-most importantly?-removing a culpable party from the allocation of fault can change that allocation. [FN134] That a jury finds that Adam, Becky, ***648*** and Cindy share fault in a 4:3:2 proportion does not mean that the same jury will find that Becky and Cindy, compared without reference to Adam, share fault in a 3:2 ratio. In fact, the relative culpabilities of Becky and Cindy, the manufacturers of the crane and cable, respectively, likely will change when one does not consider Adam's act of ignoring the warning that Becky, but not Cindy, gave him. In fact, many maritime courts conclude that they must allocate liability to judgment-proof defendants. [FN135] The McDermott Court itself reasoned that "parties will often need to describe the settling defendant's role in order to provide context for the dispute," and suggested that such a determination would "require little or no additional trial time." [FN136] Thus, to whatever extent "administrative inefficiencies" inure in including a judgment-proof defendant, inefficiencies are equally present in not including a judgment-proof defendant. A factfinder should include judgment-proof defendants because this inclusion results in a more equitable result and often will be more efficient in the long run.

## B. Harmony with the Court's Settlement Considerations

The Court's pronounced "paramount" settlement concerns-consistency with proportionate fault, the promotion of settlement, and judicial economy [FN137]-are as good a place as any to begin analysis of limited joint and several liability. How well does the approach reconcile these considerations? With respect to the first consideration, the McDermott Court favored proportionate share apportionment over the pro tanto method because pro tanto apportionment was more likely to result in nonsettiing defendants paying more than their equitable shares of damages at trial. [FN138] In contrast, under proportionate share allocation, "nonsettiing defendants pay no more than their share of the judgment." [FN139]

***649** To be consistent with proportionate fault, then, an apportionment scheme should divide a judgment-proof defendant's share of damages among the settled and nonsettled codefendants as though no settlement had occurred at all. Were the damages divided among the nonsettiing defendants only, the final result would run afoul of the command that "nonsettiing defendants pay no more than their share of the judgment." [FN140] Nonsettiing codefendants' liabilities would increase as other defendants settled, the very evii the Court sought to avoid in adopting proportionate share over pro tanto allocation. [FN141] Were the damages not divided at all (in other words, if joint and several liability simply terminated upon the occurrence of any settlement), the settlement of one defendant would

instead decrease the liabilities of the other defendants, [FN142] again obstructing the judicial goal that nonsettiing tortfeasors pay their proportionate shares of damages without regard to other parties' settlements. [FN143] Limited joint and several liability, in contrast, results in each nonsettiing defendant paying only the share of damages it would have paid had all defendants gone to trial.

With respect to the second consideration, the promotion of settlement, [FN144] the Court reasoned that, although pro tanto apportionment (without the right of contribution) would generally encourage settlement, that encouragement would come as "a consequence of the inequity" present when some defendants settle early, leaving others with a disproportionate share of the plaintiffs damages. [FN145] On the other hand, adopting pro tanto apportionment with the right of contribution would have discouraged settlement because settlement could "only disadvantage" a settling defendant: a low settlement would leave the settling defendant open to future contribution claims, [FN146] and a high settlement would leave the settlor paying too much, without a means of recouping *650 its losses. [FN147] Thus, a method of apportioning a judgment-proof defendant's share of damages should insulate settlors from future liability. Otherwise, the threat of contribution will diminish the incentive to settle. Nevertheless, incentives to settle cannot come at the expense of nonsettling parties. Limited joint and several liability satisfies both criteria, as settled parties are immune from future contribution claims, and other parties' settlements do not increase or

decrease nonsettlors' expected liabilities. Much like proportionate share apportionment, limited joint and several liability preserves settlement incentives, but does not provide additional incentives at the expense of other, nonsettling defendants.

The Court's final consideration was judicial economy; although an important factor, the Court felt it could not come at "too high a price in unfairness." [FN148] The Court preliminarily found that pro tanto apportionment with contribution was "clearly inferior" to other apportionment modes because it burdened the courts with ancillary contribution litigation. [FN149] A pro tanto rule that did not allow contribution would maximize judicial economy; [FN150] however, this approach had such a "large potential for unfairness" that the Court would not consider it. [FN151] Between pro tanto with "good faith" settlement hearings and proportionate share apportionment, the Court found the differences in judicial economy slight. [FN152] However, the proportionate share approach maximized judicial economy by delaying the determination of a settled party's liability until trial, where it would take "little or no additional trial time" or, for that matter, the case might have already settled. [FN153]

Limited joint and several liability similarly serves the interests of judicial economy. Reallocating a judgment-proof party's share of damages among the other parties is straightforward, and the division of those damages among the other parties will take little or no additional trial time. Because partial settlement does not change the liabilities of

nonsettling parties, courts do not need to conduct the "good faith" settlement hearings that the McDermott Court ***651*** disfavored. [FN154] Contribution litigation is likewise superfluous. [FN155] Like proportionate share allocation, then, limited joint and several liability can minimize demands on the courts.

### C. Modeling the Bargaining of Uncertainty

The mathematical abstraction developed in Part III, taken further, can show that the limited joint and several approach best preserves parties' expectations in settlement. Recall that, in a claim against two defendants, the at-tria! payment to the plaintiff (P)-assuming no defendants are judgment-proof-is D . *fa* + D . *fb*. The expected value of this payment prior to trial is E[D] . *E[fa]* . pa . r + E[D] . E[/b] . pb . r, reflecting the unknown nature of fault and damages, the uncertainty of prevailing against either defendant, and the discount rate. If defendant a is or becomes judgment-proof, then defendant b will pay D . (/a + *fb),* or all damages attributed to either defendant. Before trial, defendant b will expect to pay both its proportionate share of damages and a's share of damages if a is or becomes judgment-proof. The risk that a is or will become judgment-proof varies; the variable ua represents it. [FN156] If, as in Edmonds, a is immune to the plaintiff's suit, then b will certainly pay a's share of damages, and ua = 1. If a is simply facing potential bankruptcy, then b's liability fora's share of damages is less than certain, and 0 < ua < 1. Accordingly, after relaxing the assumption that defendant a can and will pay its share of a judgment,

b's expected payment is b's expected share of damages and the risk that a will be judgment-proof:

E[Pb] =
E[D] . E[/b] . pb . r + ua . E[D] . E[/a] . pa . r

For example, if the risk that a will be judgment-proof is 0.4, then b faces both its expected share and 40% of a's expected share.

Another hypothetical defendant, c, is necessary to show the allocation of this risk in settlement. Assuming that only a can become judgment-proof, defendants b and c collectively bear both their own expected shares of damages and the risk that a will be judgment-proof (ua . E[D] . E[/a] . pa , r). [FN157] Because ***652** b and c will proportionately share the risk of a's inability to pay under the limited joint and several system, b will share a's damages in the ratio *fb / fb + fc*. Defendant c will share in a's share of damages in the ratio of *fc / fb + fc*, meaning that b and c together pay a's full share of damages. Defendant b will expect to share uncollectible damages attributed to a in the ratio:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE Defendant c will expect to pay a similar ratio:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

**653* And finally, note that sb + sc = 1 and that sb = 1 - sc. Because b expects to pay a's damages in

the ratio sb . ua, b's expected payment becomes;

E[Pb] = E[D] .
E[/b] . pb . r + sb . ua . E[D] . E[/a] . pa . r

In the event of partial settlement, McDermott stipulates the entry of proportionate share judgments against the nonsettling defendants. Thus, if plaintiff and c settle, then the court will enter judgment against b for the full amount of the damages, less those damages attributed to other defendants or to the plaintiff (recall that P is the sum of all payments by defendants):

Pb = P - offset = $P - D \cdot fa - D \cdot fc = D \cdot fb$

Otherwise stated, the judgment against b will be the multiple of the total damages and b's comparative fault. However, if a is judgment-proof, then under the limited joint and several approach the court will enter judgment against b for both its own share of damages and for its proportionate share of a's damages:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE If c settles before trial-when damages (D), fault (f), probability of success (p), and probability that a will be judgment-proof (ua) are uncertain-then b's expected at-trial payment is:

E[Pb] = E[D] . E[/b] .
pb . r + sb . ua . E[D] . E[/a] . pa . r

This is, of course, the amount that b expects to pay before c settles. Thus, under the limited joint and several liability regime, c's settlement does not affect b's expected liabiiity to the plaintiff.

A good way to illustrate how the limited joint and several approach best preserves party expectations is to use two hypothetical examples in which a court does not follow it. In the simplest of terms, a court could choose to enter judgment against b for either more or less than the amount indicated by the limited joint and several liability approach. At one extreme, a court could hold that a settlement between c and the plaintiff makes b only severally liable for damages. After the plaintiff and c had settled, b's expected payment would become:
E[Pb] = E[D] . E[/b] . pb . r

Accordingly, after c's settlement, b would not expect to pay sb.ua . E [D] . Ef/a] . pa . r, and the plaintiff would not expect to recover a's share of damages from any party if a were to become judgment-proof. The settlement between c and the plaintiff would thus alter the liability that b faced. This system would discourage partial settlement because any partial settlement would extinguish **654* the plaintiffs ability to collect any of a's share of damages at trial if a were judgment-proof.

In this situation, the plaintiffs pre-settlement expectation would be full recovery by operation of joint and several liabiiity:

E[P] = E[D] . (E[/a] . pa + E[/b] .
pb + E[ft] . pb) . r

While all defendants were still parties, the risk that a would be judgment-proof (ua) would be immaterial to the plaintiff because any shortfall by

a would be paid by b and c. After settlement, however, the plaintiff could not collect any damages allocated to a in the event that a was judgment-proof. The plaintiffs expected recovery post-settlement would be:

$$E[P] = E[D] \cdot E[ft>] \cdot pb \cdot r + (1 - ua) \cdot E[D] , E[/a] \cdot pa \cdot r$$

In other words, the plaintiff would expect to recover both b's share and a's share, but its recovery of a's share would be discounted by the probability that a becomes judgment proof. The settlement thus reduces the plaintiffs expected recovery at trial by the multiple of the risk of a's insolvency and a's expected share of damages, ua , E[D] . E[/a] . pa . r; the plaintiff bears the risk of a's insolvency. Unless c were willing to pay both its own share of damages and an amount representing the entire risk of a's insolvency, no plaintiff would rationally settle with c because the settlement would place the plaintiff In a worse position than it previously occupied. Thus, the plaintiff will not settle with c for less than:

$$E[D] \cdot E[/c] \cdot pc \cdot r + ua \cdot E[D] \cdot E[/a] \cdot pa \cdot r$$

Defendant c's expected liability at trial is functionally identical to b's:

$$E[Pc] - E[D] \cdot E[ft] \cdot pc \cdot r + sc \cdot ua \cdot E[D] \cdot E[/a] \cdot pa \cdot r$$

It follows that the plaintiff will not accept less than c's expected share and the risk of a's insolvency, and that c will not pay more than its own expected share and its expected share of the risk that

a will become insolvent. Unless the risk of insolvency is insignificant (ua <<congruent>> 0), or unless c's expected share of a's damages Is great (sc <<congruent>> 1), the parties' own interests will likely keep them from reaching a settlement. Moreover, any settlement they do reach will materially alter the expectations of the nonsettlors.

At the other extreme, a court could hold that a settlement between the plaintiff and c in no way limited the joint liability between a and b. In the event that a were judgment-proof, b would pay the full amount of damages allocated to a. Defendant b's expected payment after c's partial settlement would be:

E[Pb] = E[D] . E[/b] . pb . r +
ua . E[D] . E[fa] . pa . r

***655*** Thus, after c's settlement, b's expected payment on account of a would increase from s b . u a, E[D] . *E[fa]* . pa . r to ua . E[D] . E | 7a] . pa . r. The Increase to b's expected payment is:

(1 - sb) . ua . E[D] . E[/a] . pa . r =
sc . ua . E[D] . E [fa] . pa . r

Of course, this amount is the share of a's obligation that c expects to pay prior to Its settlement. Effectively, c's settlement transfers c's share of the joint obligation to b.

At this extreme, the plaintiff still expects to recover b's share of damages and all of a's share of damages after it settles with c. The plaintiff will

rationally settle with c for an amount equal to or greater than c's own individual share of the damages (E[D] . E[/c] . pc . r). By so settling, c and the plaintiff simply transfer c's share of the joint liability for a's potential insolvency (sc . ua . E[D] . E[fa] . pa . r) to b. Clearly, then, a rule of unlimited joint and several liability encourages c to settle by allowing it to settle for less than its expected payment, but does so at the expense of an increase in b's expected payment.

This analysis demonstrates that deviating from the limited joint and several approach allows partial settlements to change other parties' expectations. Because the proportionate share rule's justification is that it preserves parties' expectations, failing to attribute portions of judgment-proof defendants' damages to prior settlements is at odds with the allocative mechanism's use. The considerations that compel the use of the proportionate share approach duly compel the use of the limited joint and several liability approach.

## V. Do Lower Court Decisions Support the Limited Joint and Several Approach?

### A. Federal Decisions

At least one decision that pre-dates McDermott from the U.S. Court of Appeals for the Fifth Circuit supports the proportionate reailocation of judgment-proof defendants' shares of damages. In Bertram v. Freeport McMoran, Inc., [FN159] an injured oil barge worker (Bertram) sued four defendants, including his employer. [FN160] Before trial,

Bertram settled with all four, but contribution claims among the parties remained. [FN161] Notably, Bertram's employer, Energy Catering Services, Inc., sought recovery from Freeport-McMoran, Inc. and Houma Industries, Inc. for maintenance and cure benefits ***656*** it (Energy) had paid to Bertram. JTN162J A bench trial allocated liability 60% to Bertram and 20% each to Freeport and Houma. [FN163] Because Freeport and Houma had partially caused Bertram's injury, and because Energy was faultless, Energy could recover the entirety of its maintenance and cure payments from the two codefendants, notwithstanding Bertram's own negligence. [FN164] Thus, the issue before the Bertram court was the correct realiocation of damages among two codefendants, each only 20% responsible for the plaintiffs harm.

The Fifth Circuit discussed the rationales of comparative fault. [FN165] When a shipowner is negligent, that shipowner can recover only individual defendants' proportionate shares of the maintenance and cure benefits that the shipowner has paid. [FIM166] However, when a shipowner is negligence-free, tortfeasors are jointly and severally liable to the shipowner for the amount of its maintenance and cure payments. [FN167] After this discussion, the Fifth Circuit affirmed the district court's equal division of the maintenance and cure benefits between Houma and Freeport. [FN168]

Unfortunately, the Fifth Circuit did not precisely articulate its allocation methodology. Given the court's discussion of comparative fault principles, one could reasonably conclude that the court reallocated

fault on a comparative basis: each defendant was 20% responsible, so relative to each other they were equally at-fault and split damages likewise. This interpretation accords with the doctrine of proportionate fault, which the Court described in Reliable Transfer as the doctrine that liability "be allocated among the parties proportionately to the comparative degree of their fault." [FN169] In other words, even though certain defendants are jointly and severally liable for an amount that exceeds their individual shares of damages, those defendants still share this joint obligation on a proportionate basis.

The U.S. Court of Appeals for the Ninth Circuit's decision in In re Exxon Vaidez [FN170]-litigation arising from the infamous oil spill that occurred when ***657** the oil tanker Exxon Vaidez ran aground in Prince William Sound, Alaska, releasing 11 million gallons of oil [FN171]-also supports the proportionate imputation of joint obligations to settled parties. In the Vaidez litigation, the U.S. District Court for the District of Alaska consolidated hundreds of punitive damage claims against the Exxon Corporation into a mandatory class action. [FN172] Exxon's settlements with Individual plaintiffs eliminated those plaintiffs from the allocation of the punitive damages award, but did not reduce the amount of the award itself. [FN173] Thus, Exxon was to remain liable for the full amount of punitive damages taxed against it, notwithstanding its prior settlement of many of the individual suits giving rise to the damages. To overcome this "disincentive" to settlement, Exxon settled with several plaintiffs using a "cede back" arrangement under which the plaintiffs remained

parties to the suit, but agreed to return their shares of the future punitive damages award to Exxon. [FN174] After a jury returned a $5 billion punitive damages award-"the largest award of its kind in history" [FN175]-the nonsettling plaintiffs argued that the court should not allocate damages to plaintiffs who had agreed to return their shares of the punitive damages to Exxon. [FN176]

Although the issue before the Ninth Circuit concerned multiple plaintiffs' claims against a single defendant, the court analogized to the McDermott scenario in which a single plaintiff presents claims against multiple defendants. [FN177] The court reasoned that the "potential distortion of settlement incentives" was "the same" [F1M178] and that Exxon's settlement using the "cede back" arrangement was "the functional equivalent of a proportionate share allocation of damages." [FN179] The court went on to hold that the settlement agreement was enforceable and that the court should not have informed the jury of its existence. [FN180]

**658* Exxon's obligation to pay punitive damages to a class of plaintiffs is, of course, very similar to jointly liable defendants' obligation to pay a plaintiff the damages assessed against a judgment-proof codefendant. In both instances, parties must transfer a sum to other parties, and that sum is either a collective obligation or a collective benefit. In both instances, a legal system that seeks to facilitate dispute resolution must ensure that partial settlements do not change the incentives faced by nonsettling parties. Just as two parties can agree to eliminate all liability between them without

disturbing other parties' claims, so too can parties agree to eliminate liability for other forms of collective damages-whether those damages are a defendant's anticipated share of damages reallocated from a judgment-proof defendant, or a plaintiffs anticipated share of punitive damages allocated to it from a lump sum amount. Thus, In re Exxon Vaidez supports the proposition that proportionate share settlements can reach damages that lie beyond the fault-based damages allocated between settled parties.

B. State Decisions

Two decisions from Louisiana's Circuit Courts of Appeal appear to interpret McDermott to require only nonsettling defendants to share in an absent codefendant's share of damages. The precise facts of the first case, Mayo v. Nissan Motor Corp., [FN181] are important to understanding the decision's import. The opinion came down but two months after the Supreme Court decided McDermott. [FN182] A bench trial had apportioned liability 11% to each of three defendants and 67% to the plaintiffs husband, who was operating the boat in which the plaintiff was a passenger at the time of the accident giving rise to her tort. [FN183] The plaintiff had not named her husband as a defendant; instead, the other defendants had impleaded the husband as a third-party defendant. [FN184] One defendant settled, and the trial court applied a pro rata comparative fault approach to its apportionment of damages. [FN185] Thus, the trial ***659*** court held each of the two nonsettling defendant's liable for only their individual 11% shares of the plaintiffs damages,

[FN186] The trial court accordingly dismissed the defendants' contribution claims against the plaintiffs husband. [FN187]

The framing of the issues at the trial and appellate levels is somewhat informative. The trial court had considered the issue one of proportionate fault. Incorrectly concluding that Louisiana law (as opposed to federal maritime law) applied to the suit, [FN188] the trial court had held each defendant liable "for only [its] joint, divisible obligation." [FN189] On appeal, the state's Third Circuit Court of Appeals considered the issue one of joint and several liability, noting that joint and several liability principles under state law conflict with those of the maritime law. [FN190] Under maritime law, a plaintiff can recover its "full damages" from any joint tortfeasor. [FN191]
From this framework, the court next considered apportionment. The court read McDermott's adoption of the proportionate share rule (against the backdrop of the Fifth Circuit's prior use of pro tanto apportionment) [FN192] to require that the two nonsettling defendants bear "100% of [the plaintiffs] damages" less the "equitable share (proportion of fault)" of the settling defendant. [FN193] Thus, the court held the two 11% defendants liable for 89% of the plaintiffs award. [FN194]

The Mayo court additionally considered a related issue: the nonsettling defendants' contribution claims against the plaintiffs husband. [FN195] The court declined to decide whether the nonsettiing defendants' claims (dismissed by the trial court) could proceed because the parties had not raised the

issue on appeal. [FN196] Partially because of this, the decision's real import is unclear, The **660* effect of the decision was that the two 11% defendants were jointly liable for 89% of the plaintiffs damages. However, the court did not necessarily intend this result: the court confined itseif to simply imposing joint and several liability pursuant to maritime law, and in crediting the settled defendant's "share" of damages. The court did not consider the treatment of uncollectible shares of damages as a whole, or even whether the husband's share of damages was in fact "uncollectible." If the defendants could pursue contribution from the husband, then (collectibility issues aside) the decision did not even reach the issue of partial settlements and judgment-proof defendants, as future contribution actions would ensure that each party paid only its proportionate share of damages. On the other hand, If the defendants could not pursue contribution against the husband, then the decision is silent even as to the allocation among the two nonsettling defendants themselves. (For example, if the plaintiff collected the full 89% from one defendant, could that defendant recover only 11% from the other defendant? Or 44.5%? Or 29.7%?). Thus, although the Mayo decision does suggest an allocation that is at odds with limited joint and several liability, whether the opinion does anything more than "suggest" that allocation is unclear.

Louisiana's Fourth Circuit Court of Appeals construed Mayo in Hennegan v. Cooper/T. Smith Stevedoring Co. [FN197] Unfortunately, the actual holding and import of this decision is likewise unclear. Hennegan sued his former employer and a

number of asbestos manufacturers for damages arising from mesothelioma. [FN198] Before trial, Hennegan settled with Cooper/T. Smith and two of the manufacturers. [FN199] A number of defendants were dismissed as parties: the City of New Orleans (a former employer of Hennegan), an additional manufacturer, and other unnamed defendants. [FN200] Bankruptcy proceedings stayed litigation against one final defendant. [FN201] Ultimately, the trial court considered the liability of Garlock, Inc., the manufacturer of asbestos gaskets and packings used in Hennegan's work maintaining steam **661* derricks on barrages, [FN202] Cooper/T. Smith, and the two settled manufacturers. [FN203] The court apportioned 80% fault to Garlock, 20% to Cooper/T, Smith, and found the two settled defendants faultless, [FN204] (The court apparently did not consider the fault of the bankrupt defendant. [FN205]) Citing "maritime joint and several liability," [FN206] the trial court entered judgment against Garlock for 80% of the $3,096,769.62 award. [FN207]

Facially, this result seems to square with proportionate share allocation: Garlock was 80% liable and paid 80% of the damages. However, the trial court's decision suggests that a nonsettling defendant is liable for all damages, less the share of damages apportioned to settled defendants, even when codefendants are judgment-proof. [FN208] As noted, the court apparently did not consider the fault of bankrupt defendant Owens Corning Fiberglass. The trial court reasoned that Garlock bore 80% responsibility because, under maritime joint and several liability, a joint defendant "is liable unto

plaintiff for the whole of plaintiffs injuries." [FN209] The court relied on Mayo to support the proposition that a maritime court should limit its allocation of fault to defendants named as parties. [FN210] The court then built from this to conclude that "the risk of the inability to collect from joint tortfeasors rests with the defendant" [FN211]-a proposition contextually suggesting that only nonsettling defendants should bear the risk of insolvency.

In support of its final proposition, the court cited Coats v. Penrod Drilling Corp., [FN212] the case in which the U.S. Court of Appeals for the Fifth Circuit declined to apportion an immune defendant's share of damages between a defendant and a plaintiff, [FN213] This case's support for allocating only to *662 nonsettling defendants is dubious; Coats merely stands for the proposition that the burden of an immune defendant's share of damages lies only with defendants, not the plaintiff [FN214] and does not consider how the risk of a judgment-proof defendant should be spread among those defendants. Additionally, although the Mayo court had indeed addressed partial settlement and an absent party, the opinion confined itself to reversing the trial court's imposition of the husband's share of fault to his plaintiff wife, without considering the liability of the husband. [FN215]

The Hennegan court concluded its discussion of joint and several liability with a discussion of McDermott's footnote ten: According to Hennigan, the McDermott Court "noted" that "the non-settling defendant's share of the judgment includes any fault attributable to immune or absent parties." [FN216]

The court did not mention that the McDermott Court qualified its footnote discussion to clarify that it was not dispositively addressing the issue of allocating uncollectible damages among defendants, [FN217] nor did it discuss the other portions of McDermott that suggest a different joint and several liability approach where both settlement and immunity restrict a plaintiffs ability to recover. [FN218] Moreover, the rationale underlying Hennegan's assertion that a court should only allocate fault to at-trlal defendants does not stand up well on close analysis. The court noted the plaintiffs argument that failing to allocate fault to "missing tortfeasors" would discourage settlement because settlement would cause the plaintiff to lose the ability to collect damages from the *663 missing parties, but it did not elaborate upon the point. [FN219] Had it done so, it might have noted that the McDermott Court found pro tanto allocation's promotion of settlement (by allowing early-settling defendants to settle with low amounts) outweighed by its "high price in unfairness." Under such a rule, the Court concluded that settlement would unfairly "threaten[] the nonsettling defendant with the prospect of paying more than its fair share of the loss." [FN220] In any event, there may be some comfort in the knowledge that Hennegan's assertion that "the non-settling defendant's share of the judgment includes any fault attributable to immune or absent parties" [FN221] is questionable as precedent. Because the trial court found Garlock 80% liable and assessed 80% of the judgment against Garlock, the issue of Garlock's liability for a judgment-proof defendant's shares of damages was beyond the issues necessary for the court to reach its opinion, [FN222] and the

pronouncement arguably has the status of dicta. Nonetheless, both decisions are disturbing in that they analyze the apportionment of partial settlements through the lens of joint and several liability, without considering what damageslie within a jointly liable tortfeasor's settlement, By making the issue the relatively simple one of, "does joint and several liability make other defendants liable for judgment-proof defendants' shares of damages?," both courts essentially decide the issue before they consider it. A better framing might be, "given that defendants are jointly liable for a judgment-proof codefendant's share, but that settlements encompass*664 ail damages taxed to a defendant at trial, should the court's reallocation depend upon whether any individual defendant has settled?"

The reallocation of judgment-proof defendants' shares of damages finds better support in state tort law. [FN223] For example, in Paradise Valley Hospital v. Schlossman, [FN224] a California appellate court considered the correct treatment of an insolvent defendant's share of damages. [FN225] California had both adopted comparative fault and retained joint and several liability. [FN226] The court reasoned that the "next logical extension" of these principles was to allocate an insolvent defendant's share of damages among solvent defendants proportionately. [FN227] Because the legal system assesses liability on the basis of fault, not dividing an insolvent's share proportionately would "create a philosophically and legally unacceptable burr." [FN228] As the court had stated earlier in its decision, the non-proportionate division

of an insolvent's share of damages "is not compatible with the comparative negligence goal of apportioning damages *665 according to [tortfeasor's] degree of fault." [FN229] Indeed, at least one scholar discussing California's adoption of comparative fault reasons that comparative fault principles, coupled with joint and several liability, indicate that "all solvent parties whose culpable conduct is causally implicated in an injury should bear the burden of an insolvent defendant according to their relative proportionate fault." [FN230]

C. Comparing the Pierringer Release

Many courts' treatment of settlements made with "Pierringer releases" supports the limited joint and several liability approach to apportioning judgment-proof defendants. Pierringer releases derive their name from Pierringer v. Hoger, [FN231] a 1963 Wisconsin Supreme Court decision construing the effect of a release that discharged a defendant's proportionate share of liability. [FN232] A Pierringer release encompasses all damages "caused by the negligence" of a settling defendant, and the settling plaintiff agrees to release and discharge the defendant for "the sum of the portions or fractions or percentages of causal negligence for which [the defendant] hereto [is] found to be liable." [FN233] Because the plaintiff releases the portion of the cause of action attributed to the settling defendant, a nonsettling defendant pays only its proportionate share of the plaintiffs damages. [FN234] Thus, nonsettiing *666 codefendants cannot seek contribution from settling parties. [FN235] Finally, because a settled defendant's share of liability

materially affects the liability of nonsettling defendants, the trier of fact must determine that settled party's relative culpability. [FN236] In practical effect, Pierringer settlements are very similar to proportionate share apportionment: under both arrangements, settlements represent a settling defendant's (yet-to-be-determined) share of liability, nonsettling defendants pay no more than their equitable shares of damages, settling defendants are not subject to future contribution claims, and triers of fact must determine settled parties' relative culpabilities. [FN237]

States are divided on the effect of Pierringer releases on judgment-proof defendants' shares of damages. [FN238] Minnesota's construction, expressed in Frederickson v. Alton M. Johnson Co., [FN239] supports the limited joint and several liability approach. In Frederickson, the plaintiff sought recovery from three joint tortfeasors. Trial by jury resulted in findings of 40% fault to each of two defendants, 12% fault to another defendant, and 8% comparative fault to the plaintiff. [FN240] The plaintiff settled with one of the 40% defendants using a Pierringer release, and the other 40% defendant's share of damages proved uncollectible. [FN241] Thus, the Minnesota Supreme Court considered the reallocation of a joint codefendant's share of damages among settled and nonsettled parties. [FN242]

First, the court limited the impact of the settlement on joint and several liability: the plaintiff's settlement with one defendant under a Pierringer ***667** release does not "waive joint liability

between all defendants." [FN243] Thus, the court held the remaining (nonsettling) parties jointly and severally liable for the uncollectible 40% share. [FN244] However, Minnesota's comparative negligence statute provided for the reallocation of an uncollectible judgment among "the other parties" according to those parties' percentages of fault. [FN245] Thus, the court reallocated the 40% uncollectible share such that the nonsettling (12%) defendant paid 20% of the verdict, the plaintiff (8%) paid 13 1/3% of the verdict, and the settled (40%) defendant's settlement covered 66 2/3% of the verdict. [FN246] Equally significant, the court held that the prior settlement between the plaintiff and the 40% defendant extinguished the plaintiffs ability to collect any damages from that defendant. The plaintiffs release of the 40% liable defendant "to the extent [that it] was liable" released both the defendant's 40% share of liability and the 26 2/3% share of damages reallocated to the defendant. [FN247]

The only difference between the outcome in Frederickson and the outcome under the limited joint and several liability regime is the allocation of uncollectible shares to the plaintiff. However, when one considers background differences between Minnesota law and the maritime law, the two approaches are even more harmonious. Minnesota law expressly requires reallocation of uncollectible damages among all parties, "including a claimant at fault." [FN248] Alternatively, the maritime law provides that the risk of uncollectibility is borne by defendants rather than plaintiffs. [FN249] Thus, the decision supports much of the reasoning of limited

joint and several liability, though applied with different game rules. Specifically, ft supports the proposition that courts should attribute all damages that would be taxed against a party at trial to that party's earlier proportionate share settlement, [FN250]

**668* In a case that is highly illustrative of the reasoning underlying limited joint and several liability, the U.S. Court of Appeals for the First Circuit held that Maine law required joint tortfeasors to allocate joint obligations proportionately among themselves. In Austin v. Raymark Industries, Inc., [FN251] the plaintiff settled with several defendants using Pierringer releases. [FN252] Trial by jury resulted in an assessment of 60% fault to a company in Chapter 11 bankruptcy proceedings. [FN253] Because the court found that Maine law had an expressed interest in according full compensation to plaintiffs by way of joint and several liability, it reallocated the bankrupt defendant's share among the remaining jointly and severally liable defendants. [FN254] Maine law also strongly advocated the allocation of damages on the basis of comparative responsibility, and the First Circuit accordingly found that the 60% obligation for the bankrupt defendant's share of damages should be proportionately reallocated among the remaining defendants. [FN255] Thus, for example, the court reallocated 22.5% (9/40) of the total damages to a defendant assessed 9% responsibility. [FN256] The court then took its reasoning a step further, holding that the prior settlements encompassed the settling parties' full liabilities imposed at trial. [FN257] The verdict

amount should be reduced by the total proportionate liability of the settling parties, including the damages that would have been reallocated ***669** to them at trial. [FN258] Such a reallocation "seemed to deprive the plaintiff of a part of her award," but, in fact, reflected only a reduction of the verdict by the settled defendants' total proportionate share of liability. [FN259]

In contrast, both North Dakota and Wisconsin allocate insolvent defendants' shares of damages to nonsettling defendants only. [FN260] The reasoning underlying North Dakota's refusal to impute judgment-proof defendants' shares to settled parties is that plaintiffs would not expect to have their recoveries diminished by any more than the proportionate share of fault attributed to a settled defendant. [FN261] When parties use Pierringer releases, North Dakota statutory law requires the reduction of a plaintiff's verdict only by the proportionate amount of fault attributed to the settling defendant. [FN262] This fact, coupled with the absence of a device for reallocating fault, led the North Dakota Supreme Court to conclude that a scheme reducing verdicts because of parties' insolvency or immunity wouid not fall within the expectations of plaintiffs. [FN263]

In Wisconsin, Pierringer releases do not require imputation of insolvents' shares of damages to settled tortfeasors because "[t]here exists no rule requiring solvent, nonsettling tortfeasors to equitably share that part of a judgment which is uncollectible from an insolvent, nonsettling tortfeasor." [FN264] Because a plaintiff has the

right to recover his total damages from any jointly liable tortfeasor, and because tortfeasors can only seek contribution for others' proportionate shares of negligence, a defendant forced to pay an insolvent's share of damages has no right to demand contribution for that amount from *670 the other defendants. [FN265] Furthermore, the Wisconsin Supreme Court reasoned that such a rule would require a plaintiff using a Pierringer release to "step into the shoes" of the settling defendant. [FN266] Because the value of the Pierringer release "would become contingent on the lawsuit," the court stated that a plaintiff would have no motivation to settle. [FN267]

Failing to impute an insolvent's share of damages to a Pierringer settlement vitiates the significance of the settlement. An essential element of a Pierringer settlement is that it does not disrupt claims asserted against other defendants. [FN268] Allowing settling parties to allocate the risk of insolvency to nonsettling parties "is fundamentally unfair." [FN269] That imputation causes the value of a Pierringer release to be contingent on trial is insignificant because the value of any Pierringer settlement is contingent on the outcome at trial. [FN270] Although the risk of a codefendant's insolvency increases the total risk involved in settlement, courts should allow the settling parties to contract among themselves for the allocation of that risk. [FN271] Such a system is preferable to one in which settling parties change the liabilities of nonsettling parties. [FN272] Notably, neither Wisconsin nor North Dakota based their refusal to impute judgment-proof defendants' shares to prior

settlements on grounds of equity or public policy. Rather, Wisconsin reasoned that, because a plaintiff could recover the insolvent's share of damages from any tortfeasor, and because that tortfeasor had no right of contribution from other defendants, no such imputation was necessary. [FN273] North Dakota ruled that Its legal precedents ***671** dictated that a plaintiffs recovery could be reduced only by the amount of the settled defendant's proportionate liability and, thus, that imputing a portion of an insolvent's share of damages would not accord with the expectations of settling plaintiffs. [FN274] How these courts square the result of these decisions-namely, that certain defendants pay much more than certain other defendants for reasons unrelated to the parties' relative faults-with basic notions of comparative fault is unclear, at least to the author of this Note.

A Pierringer settlement is so similar to proportionate share allocation that the reasoning of one should apply equally to the other. In McDermott, the Supreme Court noted that a fundamental advantage of the proportionate share approach was that settlements did not affect the liabilities of nonsettling defendants. [FN275] Under a system of proportionate share allocation, the risk that a settlement is too meager or too generous falls entirely on the settling parties. [FN276] The value of a proportionate share settlement, like a Pierringer settlement, is contingent on trial. [FN277] If a "proportionate share" Pierringer settlement encompasses all damages assessed against a settling

defendant at trial, so too should a "proportionate share" settlement under the maritime law,

## VI. Conclusion

When the Supreme Court unanimously adopted proportionate share apportionment, the Justices foresaw this Note's dilemma. In a footnote discussion, the Court suggested that "[i]t might be thought" that the issue was one of joint and several liability, and that a nonsettling defendant should perhaps thus pay both its share of damages and all of the damages allocated to a judgment-proof codefendant. [FN278] Defendants that did not settle wouid be the only defendants to which a court allocated judgment-proof defendants' shares of damages. However, the Court declined to reach the issue after noting that the plaintiff "ha[d] not requested that [the nonsettling defendant] pay any more than its 38% share of the damages." [FN279] Later in its opinion, the Court suggested that the issue might be framed as one of proportionate settlement,*672 writing that "[w]hen the limitations on the plaintiffs recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall," but that a plaintiffs agreement to settle is not a limitation on recovery due to "outside forces. "[FN280] In such an instance, according to the Court, "There is no reason to allocate any shortfall to the other defendants, . ." [FN281] If a plaintiff's "voluntary" settlement with one defendant eliminates the joint and several relationship among the remaining defendants, then

axiomaticaliy the remaining defendants are liable only for their proportionate shares of damages.

So perhaps the theme here is not one of, "what is the answer?," but is instead one of, "what is the question?" Framing the issue to be whether or not joint and several liability makes one defendant liable for damages allocated to another leads to one result; framing it as whether or not a "voluntary" partial settlement limits nonsettling defendants to their "proportionate shares" of damages leads to another. But if both questions are really just their own answers, then the astute jurist should wonder: What is it that we are actually asking? [FN282]

The Court's pronouncements on joint and several liability and proportionate settlement reach broader than the pigeonholing of "joint and several liability" and the "proportionate share rule." Both of these concepts are specific applications of broader principles. The broader principles at play are, first, fuil compensation to plaintiffs by operations of joint and several liability, and second, protection of parties' expectations in settlement by the use of pro rata apportionment. Focusing exclusively on one manifestation or the other leads to differing results, results that are essentially pre-determined when a court preliminarily decides that what is really at stake is "joint and several liability" or"proportionate share" settlement. It is thus necessary to first focus inquiry on what is really at issue: How do defendants share in joint obligations to plaintiffs? One can describe this selection of an analytic viewpoint in a number of ways; one of the simpler ways is with the somewhat-philosophic idea of looking to "mysteries"

instead of "answers." [FN283] In any event, *673 only by beginning inquiry with the aims of allocation in mind can one hope to avoid the quagmire that develops when the perceived answer dictates the content of the question.

Throughout this Note, I have attempted to rely primarily on how courts' manifestations of the underlying allocative mystery actually function; analogy to factual similarities in the vast expanse of American law secondarily supports my conclusions. By so doing, I hope that I have kept in mind that, in the end, it is a method of shifting money among people that we are expounding. [FN284] By turning my eyes to this end, I similarly hope that my analysis shows that both solutions intimated by the Court are fatally inconsistent with its established rationales for allocating damages. Rather, express and implicit principles of joint and several liability, comparative fault, and pro rata apportionment point towards a scheme in which codefendants pay judgment-proof defendants' shares of damages on a consistent, predictable basis that does not change as parties settle. While the reallocation of damages apportioned to judgment-proof defendants awaits final determination by the Court, I hope that this Note provides some guidance in the interim

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Review, who have provided excellent suggestions for the content of this Note.

[FN1]. Several factors can make a defendant judgment-proof. Unless specified otherwise, the terms "judgment proof," "insolvent," "bankrupt," and "immune" are interchangeable.

[FN2]. See generally Restatement (Third) of Torts: Apportionment of Liability (2000).

[FN3]. See id. § A19 cmt. e (providing that, under a system of "pure" joint and several liability, a jury should not include defendants that are immune to judgment in its allocation of comparative fault; however, a jury should determine the plaintiff's share of fault in relation to all parties and then apportion liability among only the non-immune parties); id. § B19 cmt. e (providing that a factfinder should allocate fault to an immune defendant under a several-liability-only regime); id. § C20 (providing that, under a "hybrid" joint and several liability system "with reallocation," a factfinder should not allocate fault to a plaintiff's immune employer unless some parties can pursue contribution against the employer under "applicable law," or unless "applicable law" allows for the reduction of damages based on the employer's fault); id. § C21 (providing that, under a "hybrid" joint and several liability system "with reallocation," a court should re-allocate the portion of a judgment for which codefendants cannot obtain contribution among all parties, including the plaintiff, on the basis of those parties' comparative responsibility); id. § D19 cmt. f (providing that, under a "hybrid" joint and several

liability system in which joint and several liability depends on a threshold level of fault, a factfinder should allocate liability to an immune employer unless the defendants can "only" be held jointly and severally liable); id. § E19 cmt. f (providing that, under a "hybrid" joint and several liability system in which the type of damages determines whether or not defendants are jointly or severally liable, a factfinder allocates liability among ail parties and "identified persons," including immune tortfeasors, unless the plaintiff can recover only economic damages for which the defendants are jointly liable).

[FN4]. See Walt Disney World Co. v, Wood, 515 So. 2d 198, 202 (Fla. 1987) (affirming state appellate court's distribution of liability).

[FN5], See id. at 201 (stating that "competing social policy" prohibits imposition of liability against spouses).

[FN6]. Id. at 199.

[FIM7]. In this Note, the term "pure joint and several liability" references a system of joint and several liability that is not contingent upon the relative faults of the parties. The term "pure comparative fault" references a comparative fault scheme in which a comparatively negligent plaintiff recovers reduced damages, even if the plaintiff is himself predominantly liable.

[FN8]. U.S. Const, art. Ill, S 2, cl. 1.

[FN9]. See Statistics Div., Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics, Mar. 31, 2002, at 44 (2002) (stating, inter alia, that 2,240 of 34,424 total "tort actions" concerned "marine" claims). Moreover, 5% of contract claims in federal courts concern maritime matters. See id. (stating, inter alia, that 2,402 of 48,927 contract claims concerned "marine" claims).

[FN10]. See Foremost Ins. Co. v. Richardson, 457 U.S. 668, 672-73 (1982) (reviewing historic bounds of maritime jurisdiction and the effect of the Court's decision in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 f 1972)).

[FN11]. See Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1332 (1996) (stating that maritime law is "[p]erhaps the most extensive modern enclave" of federal common law).

[FN12]. See Arden J. Lea & R. Jeffrey Bridger, McDermott v. AmClyde and the Rule of Proportionate Fault: Maritime Law Leads in Developing a Fair, Consistent, and Efficient Credit for Settlement Rule, 19 Tul. Mar. LJ. 261, 277 (1995) (noting that the Court's maritime decision in McDermott, Inc. v. AmClyde will likely "impact" many other areas of law); see aiso McDermott, Inc. v. AmClyde, 511 U.S. 202, 207 (1994) ("[T]he Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime." (quoting United States v. Reliable Transfer Co, 421 U.S. 397, 409 (1975)).

[FN13]. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). East River Steamship concerned tort claims for damages arising from an oil tanker's defective steam turbine. Id. at 861. As a result of the turbine's defect, the tanker's owners had incurred repair costs and had lost income while the tanker could not be used. Id. Because the statute of limitations barred actions for breach of contract, id., the Court considered whether or not the plaintiffs claims were cognizable in tort. Id. at 859. After reviewing other courts' approaches to the problem, the Court concluded that a manufacturer has no tort duty to prevent a product from damaging itself. Id. at 868-71.

[FN14], See id. at 876 (stating that whether framed in negligence or strict liability, no tort action lies for purely economic loss).

[FIM15]. See Mary J. Davis, The Supreme Court and Our Culture of Irresponsibility, 31 Wake Forest L. Rev. 1075, 1086-87 (1996) (stating that "most states" have followed East River Steamship's articulation of the economic loss rule). For examples of cases relying on East River Steamship, see 2-J Corp. v. Tice, 126 F.3d 539, 542 (3d Cir. 1997); Nat'l Tel. Co-op. Ass'n v. Exxon Corp., 38 F. Supp.2d 1, 14 (D.D.C. 1998); Lloyd Wood Coal Co. v. Clark Equip. Co., 543 So. 2d 671, 672 (Ala. 1989); Comptech Int'l. Inc. v. Mi lam Commerce Park, Ltd., 753 So. 2d 1219, 1224 (Fla. 1999); Trans States Airlines v. Pratt & Whitney Can., Inc., 682 N.E.2d 45, 54 (Ill. 1997); Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 489 (Ind. 2001); Neibarger v. Universal Coops., Inc., 486 N.W.2d 612, 618 (Mich. 1992).

[FN16]. See Reliable Transfer, 421 U.S. at 411 (holding that the maritime law should allocate liability according to the comparative fault of the parties).

[FIN17]. See McDermott, 511 U.S. at 220 (stating that the Edmonds opinion, which adopted comparative fault in the maritime law, "merely reaffirm [s]" joint and several liability); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 271 n.3Q (1979) (holding that adoption of comparative fault "did not upset" the scheme of joint and several liability).

[FN18]. McDermott, Inc. v. AmClyde, 511 U.S. 202, 204 (1994).

[FN19]. See Lea & Bridger, supra note 12, at 275 (1995) (noting that most discussions of settlement regimes "raise the problems" of insolvent tortfeasors),

[FN20]. See Edmonds, 443 U.S. at 269 (holding shipowner solely liable for longshoreman's damages, in spite of statutorily immune stevedore's concurrent fault, by operation of joint and several liability).

[FIM21]. See McDermott, 511 U.S. at 209 (stating that under proportionate share allocation, nonsettling defendant cannot seek contribution because it pays only its proportionate share of plaintiffs damages).

[FN22]. Restatement (Third) of Torts: Apportionment of Liab. § 10 cmt. a (2000).

[FN23]. See Kathleen M. O'Connor & Gregory P, Sreenan, Apportionment of Damages: Evolution of a Fault-Based System of Liability for Negligence, 61 J. Air L. & Com. 365, 374-75 (1996) (noting that approximately thirty-five states have abolished or modified joint and several liability).

[FN24]. See id. at 375 (stating that joint and several liability reforms range from complete abolition to modification or limited application); id. at 377-78 (noting that some state statutes reallocate judgment-proof defendants' shares).

[FN25]. See McDermott, Inc. v. AmClyde, 511 U.S. 202, 220-21 (1994) (reviewing the history of joint and several liability in maritime law and concluding that the adoption of both comparative fault and proportionate share apportionment did not modify this doctrine).

[FN26], See id. at 221 (stating that, under joint and several liability, codefendants bear the burden of a defendant's insolvency rather than the plaintiff); see also O'Connor & Sreenan, supra note 23, at 375 (noting that the "real issue" in apportionment is the allocation of the risk of a defendant's insolvency or absence, and that several liability places that risk entirely on the plaintiff).

[FN27]. Edmonds v. Compagnie Generale Transatiantique, 443 U.S. 256 (1979). A discussion of the issues, holding, and import of Edmonds follows in subpart II.A,

[FN28], McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994). For a discussion of the issues, holding, and import of Edmonds, see infra subpart II.B.

[FN29]. Edmonds. 443 U.S. at 258.

[FN30]. Id. at 261 (citing 33 U.S.C. S 905 (1976), amended by 33 U.S.C. S 905 (Supp. II 1984)).

[FN31]. See id. at 258-59 (stating that Court granted certiorari to resolve whether or not shipowner was liable for only its proportionate share of damages).

[FN32]. 33 U.S.C. SS 901-950 (2000).

[FN33]. Edmonds. 443 U.S. at 262-63 (quoting 33 U.S.C. 5 905 (1976), amended by 33 U.S.C. § 905 (Supp. II 1984).

[FN34]. Id. (quoting Edmonds v. Compaqnie Generaie Transatiantique. 577 F.2d 1153, 1155 (4th Cir. 1978)).

[FN35]. Id. at 258-59 (citing Edmonds. 577 F.2d at 1155-56).

[FN36]. Id. at 262.

[FN37], See id. at 266-67 (noting that the legislative history counseled against the Fourth Circuit's construction).

[FN38]. See id. at 267-68 (discussing 33 U.S.C. § 905 (1976), amended by 33 U.S.C. S 905 (Supp. II 1984), and noting that Congress expressed no intent to

change the common law, but did express an interest in not limiting a shipowner's liability),

[FN39]. Id. at 270.

[FN40], Id. at 273.

[FN41]. Id.

[FN42]. See McDermott, Inc. v. AmClyde. 511 U.S. 202. 220 (1994) (stating that Edmonds both affirmed joint and several liability and demonstrated that the adoption of proportionate fault did not "abrogate" joint and several liability).

[FN43], See Edmonds, 443 U.S. at 270 (reasoning that any inequity in the allocation of damages should not fall on an injured longshoreman, as this is the party that Congress intended to protect).

[FFN44]. McDermott. 511 U.S. at 204-05.

[FN45]. Id. at 205.

[FN46]. Id. at 206.

[FN47]. See id. at 206 n.5 (stating that a special interrogatory to the jury instructed it to consider the fault of the plaintiff and the sling defendants jointly).

[FN49], McDermott, Inc. v. Clyde Iron, 979 F.2d 1068, 1072 (5th Cir. 1993), rev'd sub nom., McDermott, Inc. v. AmClyde. 511 U.S. 202 (1994).

[FN50]. Id, at 1075-76.

[FN51]. Id. at 1079-80.

[FN52]. Id. at 1080-81,

[FN53], See McDermott, 511 U.S. at 204 (stating that the question presented is the calculation of a nonsettling defendant's liability).

[FN54]. Id.

[FN55]. Id.

[FN56]. See id. at 208-09 (stating that no consensus exists regarding apportionment problems, as evinced by the Restatements varied positions on the matter).

[FN57]. Id. at 208 (quoting Restatement (Second) of Torts § 886A(1) (1977)).

[FN58]. Id. at 208-09 (quoting Restatement (Second) of Torts § 886A(2) (1977)).

[FN59]. Id. at 217. "Pro rata" apportionment is the same as proportionate share apportionment. Id. At 210n.9.

[FN6O]. Id, at 209 (quoting Restatement (Second) of Torts § 886A(3) (1977)). A defendant's "equitable share" is that portion of damages that corresponds with the defendant's proportionate fault. Restatement (Second) of Torts § 886A cmt. h (1977).

[FN61]. McDermott, 511 U.S. at 210.

[FN62]. Id.

[FN63]. McDermott, Inc. v. Clyde Iron, 979 F.2d 1068, 1076 (5th Cir. 1993), rev'd sub nom., McDermott, 511 U.S. at 202.

[FN64]. McDermott, 511 U.S. at 210 n.10.

[FN65]. Id. at 211.

[FN66]. Id. at 212.

[FN67]. See id. at 211-12 (reasoning that settlement can "only disadvantage" a settlor with contribution claims in the future or with overpayment in the present).

[FN68]. See id. at 212 (reasoning that, under pro tanto without contribution, nonsettling defendants will "frequently" be liable for more than their equitable shares).

[FN69]. See id. at 213 (reasoning that settlement amounts are likely less than a defendant's equitable share of damages because they reflect future uncertainty and can be used to finance further litigation by a plaintiff).

[FN70]. Id. at 213-14.

[FN71]. Id.

[FN72]. See id. at 215 (reasoning that pro tanto without contribution encourages parties to settle because parties that refuse to settle may be forced to pay more than their "fair share" of damages).

[FN73]. Id.

[FN74]. Id.

[FN75]. Id.

[FN76]. See id. at 216 (noting that, because of potential unfairness, no party or amicus advocates pro tanto allocation without contribution unless coupled with good faith hearings).

[FN77]. See id. at 216-17 (noting that while a court must determine a settling party's fault at some point, under a pro tanto scheme the court must determine the settlor's fault at a separate pretrial hearing).

[FN781. Id. at 217.

[FN79]. Id.

[FN80]. Id.

[FN81]. Id.

[FN82]. Id. at 220.

[FN83]. Id. at 220-21 (emphasis added).

[FN84]. Id. at 221.

[FN85]. Id.

[FN86]. Id. at 220.

[FN87]. An allusion to cultural icon Ken Kesey illustrates this theme:

> The answer is never the answer. What's really interesting is the mystery. If you seek the mystery instead of the answer, you'll always be seeking. I've never seen anybody really find the answer-they think they have, so they stop thinking. But the job is to seek mystery, evoke mystery, plant a garden in which strange plants grow and mysteries bloom. The need for mystery is greater than the need for an answer.

These words, attributed to Kesey, appeared on the programs distributed at his November 14, 2001 funeral. M.L Lyke, Ken Kesey Goes Out in Proper Tie-Dye, Seattle Post-Intelligencer, Nov. 15, 2001, at Al. One can find the quote in its entirety at http://www.intrepidtrips.com (last visited February 23, 2003). For a thought-provoking account of Ken Kesey's exploits during the 1960s, see Washington and Lee alumnus Tom Wolfe's excellent book, The Electric Kool-Aid Acid Test (1968). [FN88]. See Eric M. Danoff, Settlement Credit and Contribution Under Maritime Law: The Effect of McDermott, Inc. v. AmClyde, 7 U.S.F. Mar. LJ. 187, 201 (1994) (noting that joint and several liability "does not always square" with the McDermott Court's proportionate fault goals); Lea & Bridger, supra note 12, at 275 (noting that most commentators on

apportionment methods raise the problem of insolvent defendants).

[FN89]- Although Paul can execute his $900,000 judgment ($1 million less 10% comparative negligence) against any of the three jointly and severally liable defendants, any defendant forced to pay more than its proportionate share of damages can seek contribution from the others. Thus, after the contribution actions conclude, each party will have paid its proportionate share of the judgment.

[FN90]. See McDermott, Inc. v. AmClyde, 511 U.S. 202, 220-21 (1994) (holding that Edmonds "merely reaffirm[s] the well-established principle of joint and several liability/' which requires one defendant to pay more than its proportionate share of damages when "factors beyond the plaintiffs control" limit a plaintiffs recovery),

[FN91], See id. at 221 (stating that limitations on a plaintiffs recovery because of settlement are not "outside forces").

[FN92]. See id. at 210 n.10 (stating that, while principles of joint and several liability and Edmonds could be seen to mandate this result, the plaintiff has not requested that the defendant pay more than its individual, proportionate share of the damages),

[FN93]- See id. (stating that under such a view a proportionate credit approach "takes into account" this "quasi settlement").

[FN94]. See Restatement (Third) of Torts: Apportionment of Liability § 16 cmt. c (2000) ("[M]ost settlements are discounted by the estimated probability of liability of the settling tortfeasor and, to some extent, for the costs and fees saved . . . .").

[FN95]. See McDermott. Inc. v. AmClvde, 511 U.S. 202, 213 (1994) (noting that settlements normally do not "reflect an entirely accurate prediction of the outcome of a trial").

[FN96]. Id.

[FN97]. See Lewis A. Kornhauser & Richard L. Revesz, Settlements Under Joint and Several Liability, 68 N.Y.U. L. Rev. 427, 458-64 (1993) (detailing the potential role of these factors in the economic modeling of settlement negotiations).

[FN98]. See Richard A. Posner, Economic Analysis of Law § 21.5, at 613 (5th ed. 1998) (discussing how discount rates affect settlement by generally increasing the stakes of maintaining litigation, but also noting that relative discount rates between the plaintiff and the defendant may differ).

[FN99]. See id, (noting that the discount rate is related to the probability of success because "[d]efay increases uncertainty" and thus both decreases the probability of success and increases the discount rate).

[FN10O]. See Robert D. Cooter & Daniel L. Rubinfield, Economic Analysis of Legal Disputes and Their Resolution, 27 J. Econ. Literature 1067, 1076

(1989) (reasoning that economic modeling anticipates disparity between expected lawsuit values and actual verdict amounts because the subjective value equals expected damages multiplied by the subjective probability of award); Jeffrey *3.* Rachlinski, Gains, Losses, and the Psychology of Litigation, 70 S. Cal. L. Rev. 113, 116-18 (1996) (reasoning that settlement values reflect both probabilities of success at trial and parties' risk preferences, but that litigants may make "suboptimal" settlement decisions because of other factors). Cooter and Rubinfield also note that risk aversion may further increase this disparity. See Cooter & Rubinfield, supra, at 1076 (reasoning that trial is a "gamble" and thus the subjective value to risk-adverse participants differs from the expected value).

[FN101]. Much of the law and economics literature implicitly assumes a divergence between actual verdicts and parties' subjective values during settlement, See Posner, supra note 98, § 21.5, at 609-11 (evaluating the discrepancy between at-triai judgments and parties' subjective, pre-trial settlement valuations on the bases of subjective probabilities of success, litigation costs, discount rates, and degrees of risk aversion).

[FN102]. See McDermott, Inc. v. AmCivde, 511 U.S. 202, 213-14 (1994) (stating that even when liability can be accurately determined in advance of trial, the uncertainty of trial can make pro tanto allocation visit "substantial unfairness" on nonsettling defendants).

[FN103]. Id.at213.

[FN104]. See Restatement (Third) of Torts: Apportionment of Liability § 16 cmt. c (2000) (reasoning that pro tanto allocation is unfair because settlement amounts are normally less than actual damages assessed at trial); Restatement (Second) of Torts § 886A cmt, m (1977) (stating that pro tanto apportionment provides a "clear incentive" for collusion and that it can be "very unfair" to other tortfeasors); see also TedvBilt, Inc. v. Woodward-Clyde & Assocs., 698 P.2d 159, 166 (Cal. 1985) (finding that a "good faith" settlement hearing should consider the amount of the settlement relative to the settling defendant's share of the plaintiffs expected damages, but that courts should recognize that settling parties pay less than they would if found liable at trial); River Garden Farms, Inc. v. Superior Court, 103 Cal. Rptr. 498, 503 (Cal. Ct. App. 1972) (noting that pro tanto apportionment is "vulnerable to abuse" because a plaintiff can select certain defendants to bear disproportionate sharcs of damages).

[FN105], See Tech-Bilt, 698 P.2d at 167 (stating that "practical considerations" require the evaluation of the reasonableness of a settlement amount on the basis of the information available at the time of the settlement).

[FN106]. See Restatement (Third) of Torts: Apportionment of Liability § 16 cmt. c (2000) (stating that a disadvantage of pro tanto allocation is that it imposes settlement inadequacies on nonsettling tortfeasors and that pro tanto allocation usually increases the liabilities of nonsettling tortfeasors); Daniel Klerman, Settling

Multidefendant Lawsuits: The Advantage of Conditional Setoff Rules, 25 J. Legal Stud. 445, 451-52 (1996) (reasoning that, under pro tanto apportionment, settlement with one defendant leaves the nonsettling defendant "with a larger expected liability" than if both parties went to trial),

[FN107]. See supra text accompanying notes 88-89 (detailing hypothetical example).

[FN108]. This hypothetical continues to assume that a joint defendant satisfying the judgment will pursue contribution from the other tortfeasors. Thus, all defendants ultimately pay their proportionate shares.

[FN109]. Cf. Frank H. Easterbrook et al., Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J.L & Econ. 331, 356-60 (1980) (demonstrating that under a rule of no contribution, codefendants' settlements increase the expected liabilities of nonsettling defendants and inferentially supporting the proposition that failing to deduct a settled defendant's proportionate share of damages increases the nonsettling defendants' expected liabilities). The McDermott Court entertains a similar calculus to demonstrate the attractiveness of settlement to plaintiffs under pro tanto apportionment, McDermott, Inc. v. AmClyde, 511 U.S. 202, 214 n.20 (1994). McDermott also illustrates the "potential for unfairness" to nonsettling codefendants under a pro tanto rule. Id. at 212 n.14.

[FN110]. See Restatement (Third) of Torts: Apportionment of Liability § 16 cmt. c (2000) (stating that a plaintiff and a settling tortfeasor effectively "externalize" a part of the settling tortfeasor's iiability to nonsettling tortfeasors); see also McDermott, 511 U.S. at 214 (stating that pro tanto apportionment "is likely to lead to inequitable apportionments of liability"); cf. Charles O. Gregory, Legislative Loss Distribution in Negligence Actions; A Study in Administrative Aspects of Comparative Negligence and Contribution in Tort Litigation 77 (1936) (showing that when a plaintiff secures a joint and several verdict against one defendant, the plaintiff transfers the risk of insolvency entirely to that defendant; thus showing that a partial settlement under a pro tanto regime transfers risk from the settling parties to the nonsettling parties).

[FN111], Scholars examining the expected value of a lawsuit generally view this value as a function of the expected amount of damages and the expected proportion of fault. See Posner, supra note 98, § 21.5 (examining parties' decision to settle or proceed to trial as a function of the amount of the judgment and the subjective probability of prevailing against a defendant, but subtracting costs). Judge Posner elsewhere considers the time value of money an appropriate discounting factor. See Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399, 417 (1973) (reasoning that plaintiffs offer is a function of the "present value" of the judgment). On the other hand, economically oriented legal analyses sometimes do not consider costs as a factor on account of simplicity. See Lewis A. Kornhauser &

Richard L. Revesz, Multidefendant Settlements: The Impact of Joint and Several Liability, 23 J. Legal Stud. 41, 71 (1994) (restricting inquiry by excluding costs "[f]or simplicity"). This Note's analysis focuses on the impact of allocation mechanisms on the amounts of damages that parties expect to pay at trial. Though costs are undoubtedly a critical factor in whether or not the parties do, in fact, decide to proceed to trial, they do not directly contribute to the amount of damages assessed against a defendant at trial, and this Note accordingly excludes them from inquiry. For another scholar's analysis of the expected cost of a lawsuit, considering this cost to be a function of the amount of damages and the probability of prevailing with costs subtracted, see A. Mitchell Poiinsky, An Introduction to Law and Economics 107-09 (2d ed. 1989).

[FN112], This again assumes that contribution claims will equitably adjust the amounts paid by the defendants. Supra note 108.

[FN113]. See McDermott, 511 U.S. at 213 (reasoning that settlements normally do not reflect "entirely accurate" predictions of trial outcomes).

[FN114]. Cf. id. at 212 (stating that, under proportionate share allocation, a nonsettiing defendant pays only its proportionate share of a judgment, whereas under a pro tanto system a settlement for less than a defendant's equitable share "requires the nonsettiing defendant to pay more than its share").

[FN115]. See id. at 221 (stating that settlement is not a limitation on a plaintiffs recovery due to "outside forces" and, thus, that joint and several liability does not implicate nonsettiing codefendants for the "shortfall"); see also id. at 220 (stating that "no inconsistency" exists between joint and several liability and proportionate share apportionment).

[FN116]. See id. (noting that, in the case of settlement, a plaintiffs recovery is limited only by the plaintiffs decision to settle with a defendant).

[FN117]. Id. at 209.

[FN118]. See id. at 221 (stating that "no reason" exists to allocate a recovery "shortfall" to nonsettiing defendants when a plaintiff negotiates a partial settlement).

[FN119]. See id. (stating that joint and several liability can make one defendant pay more than its proportionate share of damages when a plaintiffs recovery is limited by factors beyond the plaintiffs control); Edmonds v. Compagnie Generaie Transatlantique, 443 U.S. 256, 269 (1979) (holding that a codefendant is liable for "all" damages, "yet its negligence may have been only a minor cause of the injury"); see also supra notes 37-43 and accompanying text (discussing Edmonds's elaboration of a codefendant's joint liability for an immune tortfeasor's share of damages).

[FN120]. Recall that the McDermott Court suggested that the issue was one of whether recovery limitations were "voluntary" or "involuntary."

McDermott's dicta does not resoive how one should characterize the situation in which one defendant is judgment-proof and some of the parties have partially settled. Compare McDermott, Inc. v. AmClyde, 511 U.S. 202, 211 n. 10 C1994) (stating that "[i]t might be thought" that joint and several liability and Edmonds make a nonsettiing party liable for all damages less the plaintiffs share and the settling defendant's share) with id. at 221 ("Unlike the rule in Edmonds, the proportionate share rule announced in this opinion applies when there has been a settlement. In such cases, the plaintiffs recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement."). This Note's conclusion returns to this point.

[FN121]. Cf. id. at 212 (stating that a chief advantage of proportionate share allocation is that "a litigating defendant ordinarily pays only its proportionate share of the judgment").

[FN122]. See supra text accompanying notes 88-89 (detailing hypothetical example).

[FN123]. See Restatement (Third) of Torts: Apportionment of Liab. § A19 cmt. e (2000) (stating that regime of "pure" joint and several liability "does not permit" a factfinder to allocate liability to any defendants that are immune to judgment); see also id. § A19 cmt. b, reporters' note (clarifying that "parties" included in a factfinder's apportionment are only those that are parties to the suit and that

are further "bound by the judgment in it"). Whether or not this "bound by the judgment" language means that the allocation should include bankrupt defendants, against whom litigation is stayed, is unclear.

[FIM124]. See id. § A19 cmt. e (stating that "the jury [should] initially decide any comparative share of responsibility for the plaintiff in reference to ail other[]" defendants, whether parties to the suit or not).

[FN125]. See id. (stating that after determining plaintiffs comparative fault, the factfinder "apportion [s] the remaining responsibility to [the party] defendants").

[FN126]. Id. § A19 cmt. e, reporters' note.

[FN127]. Id. § C19 cmt. e. The comment also notes that "immunities" mean simply that a "person has no duty or has not breached any duty as a matter of law" and that a court must "sort out" these "immunities" from actual immunities. Id. Suffice it to say that summary judgment is available to any defendant that owes or has breached no duty as a matter of law. See generally Fed. R. Civ. P. 56.

[FN128]. For a published example, see Austin v. Raymark Industries, Inc., 841 F.2d 1184, 1186, 1196 (1st Cir. 1988), in which the U.S. Court of Appeals for the First Circuit reallocated the 60% share of liability allocated to a defendant that had become bankrupt while an appeal was pending.

[FN129]. For the uninitiated: Federal law "stays" proceedings against persons and entities that file for bankruptcy. 11 U.S.C. § 362(a) (2000). Among other things, bankruptcy stays prevent "the commencement or continuation" of actions against those filing for bankruptcy, as well as the enforcement of judgments. Id. § 362(a)(1)-(2). There are a number of exceptions to bankruptcy stays, e.g., id. § 362(b), and a court can end or modify a stay "for cause" or for other reasons, id. § 362(d).

[FN130]. For example, 11 U.S.C. 5 502 *(2000)* allows claims for contribution under certain circumstances.

[FN131], "Maintenance and cure" is a shipowner's obligation to provide seamen who become ill or suffer injury in the service of a vessel both per diem living allowances and payments for medical expenses. Bertram v. Freeport McMoran, Inc., 35 F.3d 1008, 1011-12 (5th Cir. 1994). A shipowner must pay maintenance and cure benefits without regard to fault. Id. at 1012. A shipowner forced to pay maintenance and cure benefits due to another's negligence may be able to recover the payments from the negligent party. See infra notes 166-68 and accompanying text (discussing tortfeasors' obligation to reimburse shipowners for maintenance and cure payments).

[FN132]. See Kniaht v. Alaska Trawl Fisheries. Inc., 154 F.3d 1042. 1046 (9th Cir. 1998) (holding that "Ryan indemnity," allowed by Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp., 350 U.S. 124 (1956), is not available to a shipowner that is itself negligent). Other circuits have held that a shipowner's

negligence only reduces the shipowner's claim on a comparative basis, id., or that it does not affect a shipowner's claim for Ryan indemnity at all, id. at 1045.

[FN133]. Cf. McDermott, Inc. v. AmClyde, 511 U.S. 202, 211 (1994) (noting that a significant drawback to pro tanto allocation is its tendency to create "unnecessary ancillary litigation").

[FN134]. See Chaney v. Falling Creek Metal Prods., Inc., 906 F.2d 1304, 1308 n.7 (8th Cir. 1990) (finding that district court should have included an immune party in the jury's liability apportionment in order to clarify that immune party's role, and that the court afterwards should have reallocated the immune party's share of damages to the other parties); see also Pierringer v. Hoaer, 124 N.W.2d 106, 111-12 (Wis. 1963) (stating that a nonsettling defendant's comparative fault can only be determined "by a proper allocation of all the causal negligence"). The Restatement explicitly considered this possibility. It notes: The immune nonparty's share of comparative responsibility may not be assigned to (and borne by) the parties in the same proportion as would have occurred if the factfinder assigned comparative responsibility to the immune person and that share were then reallocated .... Nevertheless, the immune person's responsibility will be apportioned among those who otherwise bear responsibility. Restatement (Third) of Torts: Apportionment of Liability § C19 cmt. e (2000).

[FN135]. See, e.g., Coats v. Penrod Drilling Corp., 61 F.3d 1113, 1116 (5th Cir. 1995) (stating that liability

should be apportioned to both an immune employer and a non-immune codefendant); Geyer v. USX Corp., 896 F. Supp. 1440, 1446 (E.D. Mich. 1994) (ruling that the need to apportion liability to all defendants does not prevent the dismissal of a settled party from the action because liability can be apportioned to an "empty chair" defendant (quoting McDermott, 511 U.S. at 217)); cf. Harrison v. Garber Bros., Inc., 750 F. Supp. 203, 204 (E.D. La. 1990) (ruling that a jury should both consider and determine a settled, nonparty tortfeasor's share of relative fault); Bordelon v. Consol. Georex Geophysics, 628 F. Supp. 810, 812 (W.D. La. 1986) (ruling that comparative fault cannot be determined without reference to an immune party's culpability).

[FN136]. McDermott, 511 U.S. at 217.

[FN137]. Id. at 211.

[FN138]. See id. at 212 (reasoning that, under pro tanto allocation, a nonsettling defendant's liability will "frequently" differ from its equitable share of damages).

[FN139]. Id. at 209.

[FN140]. Id.

[FN141]. See id. at 212 (reasoning that pro tanto allocation is inconsistent with proportionate fault allocation because a settlement with one defendant for less than its equitable share requires the other defendants to pay more than their equitable shares).

[FN142]. Before the settlement, ali defendants would be responsible for both their own shares of the damages and the damages of the judgment-proof defendant. After the settlement, defendants would be liable only for their own shares of damages, as the joint and several relationship among the defendants would terminate.

[FN143]. See McDermott, Inc. v. AmClyde, 511 U.S. 202, 213 n.14 fl994) (stating that a drawback of pro tanto allocation is that nonsettling defendants likeiy pay either more or less than their equitable shares of damages).

[FIM144]. Id. at 211.

[FN145]. Id. at 214-15.

[FN146]. See id. at 211-12 (reasoning that nonsettling defendants can sue a settling defendant for contribution).

[FN147], See id. at 211 n.13 (explaining that settlors "ordinarily" have no right of contribution).

[FN148]. Id. at 215. "Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." (citing United States v. Reliable Transfer Co., 421 U.S. 397, 408 (1975)).

[FN149]. Id. at 211-12.

[FN150]. See id. at 216 (reasoning that pro tanto apportionment without "good faith" hearings would

be easy to administer because a court would never adjudicate the settling defendant's fault).

[FN151]. See id. (stating that the approach would be so unfair that "no party or amicus" advocates it).

[FN152]. See id. ("The effect of the two rules on judicial economy is also ambiguous.").

[FN153]. Id. at 217.

[FN154]. See id. (discussing the superiority of at-trial determinations of relative culpability versus pretrial determinations); see also supra notes 78-81 and accompanying text (discussing McDermott's expressed favor for at-trial liability determinations).

[FN155]. Cf. McDermott, Inc. v. AmClyde, 511 U.S. 202, 209 (1994) (holding that, under proportionate share approach, contribution suits are both unnecessary and prohibited because nonsettling defendants "pay no more than their share of the judgment"),

[FN156]. Though it is impossible (or close to impossible) to cite others for every step in this subpart's analysis, it is still noteworthy that other authorities have modeled the impact of a defendant's potential insolvency by multiplying the solvency risk times the expected damages, Kornhauser & Revesz, supra note 111, at 520.

[FN157]. Of course this assumption is unrealistic, as any defendant has the potential of being or becoming judgment-proof. A more accurate approach would

view an individual defendant's expected payment as that defendant's expected share of damages discounted by the possibility that it (the individual defendant at issue) will be insolvent, plus each other defendant's expected payments multiplied by the possibility that those defendants will become insolvent. Under this formulation, b's expected payment is E[Pb ] = (1 - ub) . E[D] . E[/b] . pb . r + E[/b] . pb + (E[ft>] . pb + E *[ft]* . pc) . ua E[D] . Ef/a] . pa . r + E[/b] . pb + (E[/a] . pa + E[fl_b] . pb) . uc . E[D] . E[/fc] . pc . r. Thus, b expects to pay its expected share of damages discounted by its own risk of insolvency, as well as proportionate shares of a's and c's damages if those defendants become judgment-proof. However, even this model is incomplete because it does not fully account for the risk that both a and c will be judgment-proof, in which case b will pay all damages. Nevertheless, by assuming that only one defendant is in danger of being judgment-proof, the simpler model illustrates precisely the same point: parties have rational expectations regarding other parties' solvency. Moreover, this assumption is not entirely unrealistic: because most defendants are not judgment-proof, typical cases will not involve more than one defendant that is realistically in danger of being judgment-proof.

[FN158]. One might think that the expected ratio is simply the fraction of the expected faults, but this ignores the fact that whether or not a factfinder will even find liability is unknown at trial. Suppose that b and c expect to share fault equally (30% each), but that the chance of prevailing against c is very low (0.1) while the chance of prevailing against b is good

(0.9). Without considering the probability of success, one would think that b expects to pay half of a's damages in the event a is judgment-proof. However, before trial b knows that the plaintiff probably cannot prevail against c, and that if the plaintiff cannot prevail, then b will pay both its share of damages and a's share of damages (if a is insolvent). Because c probably will not pay any damages, the plaintiff thus expects to pay 90% of a's damages if a is judgment-proof: (E[ft>] . pb) + (EjYb] . pb + E[/c] . pc) = (0.3 . 0.9) + (0.3 . 0.9 + 0.3 . 0.1) = 0.9. For the sake of simplicity, this Note represents the ratio with the variable sb. Note that if pb = pc, then the expression simplifies back to E[ft>] + (E[/b] + E[/c]) because pb and pc become the same constant that equally affect the numerator and denominator. Many cases will involve probabilities of success that are highly correlated, thus negating the need to consider the import of uncorrelated probabilities of success. See Kathryn E. Spier, Settlement with Multiple Plaintiffs: The Role of Insolvency, 18 J.L Econ. & Qrg. 295, 296 (2002) (noting that positive correlation can result from common unresolved questions of law or from the fact that the cases rely upon the same evidence or facts).

[FN159]. Bertram v. Freeport McMoran, Inc., 35 F.3d 1008 (5th Cir. 1994).

[FN160]. Id. at 1011.

[FN161]. Id. Recall that a shipowner must pay maintenance and cure benefits to an injured seaman regardless of fault. Supra note 131.

[FN162]. Bertram. 35 F.3d at 1011.

[FN163]. Id.

[FN164]. Id. at 1013, 1021.

[FN165]. Id. at 1019-21.

[FN166]. See id. at 1020 (stating that a tortfeasor contributes to a concurrently negligent employer "to the extent" the accident was occasioned by the tortfeasor's fault (quoting Adams v. Texaco, Inc., 640 F.2d 618, 621 (5th Cir. Unit A 1982)).

[FN167]. See id. (stating that a fault-free shipowner can collect all maintenance and cure benefits from the negligent parties).

[FN168]. Id. At 1021.

[FN169]. United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975).

[FN170]. In re Exxon Vaidez, 229 F.3d 790 (9th Cir, 2000),

[FN171]. Id. at 793.

[FN172]. Id.

[FN173]. See id. ("[A] plaintiffs release of its slice of the future lump-sum punitive damages award merely reduced the number of claimants sharing the punitive damages pie, not the size of the pie itself.").

[FN174]. Id.

[FN175]. Id. at 794.

[FN176]. Id.

[FN177]. See id. at 796 ("We deal here with multiple plaintiffs suing one defendant, but an analogous problem frequently occurs in the more typical situation of a single plaintiff with claims against multiple defendants.")'

[FN178]. Id. at 797.

[FN179]. Id. at 798.

[FN180]. See id. ("[W]e cannot hold such an agreement unenforceable as a matter of public policy."); id. at 799 ("[I]t is clear that cede back agreements should generally not be revealed to juries deliberating on punitive damages.").

[FN181]. See Mayo v. Nissan Motor Corp., 639 So. 2d 773, 789 (La. Ct. App. 1994) (concluding, partially on the basis of McDermott's "equitable share" holding, that "plaintiff is entitled to recover up to 100% of her damages from either Nissan or Red River, less the amount of the equitable share (proportion of fault) of the obligation of Fisher Marine, the settling tortfeasor").

[FN182]. Compare id. at 773 (decision of June 22, 1994) with McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994) (decision of Apr. 20, 1994).

[FN183], Mayo, 639 So. 2d at 776.

[FN184]. Id. at 790.

[FN185]. See id. at 782 ("This Court can find no prohibition from extending comparative fault to admiralty cases in state courts." (quoting triai court)).

[FN186]. Id. (quoting trial court).

[FN187]. Id. at 790 (quoting trial court).

[FN188]. See id. at 782 (stating that comparative fault "is the law of the State of Louisiana and petitioners shall be bound by it" (quoting trial court)).

[FN189]. Id. (quoting trial court).

[FN190]. See id. at 789 ("It is clear that there is a conflict between maritime and state law regarding the extent of exposure for joint tortfeasors.").

[FN191]. Id. at 788.

[FN192]. See id. at 789 (stating that in McDermott, "the United States Supreme Court reversed the Fifth Circuit's long-standing rule that a nonsettling tortfeasor is entitled to fuil credit in the amount the plaintiff received from a settling tortfeasor").

[FN193]. Id.

[FN194]. See id. at 791 (imposing joint judgment for full damages less 11% attributed to settled tortfeasor).

[FN195]. Id. at 790-91.

[FN196]. See id. at 791 ("The judgment dismissing the third-party demands against Everette Mayo is final. Nissan and Red River Marine did not appeal from this judgment and we are powerless to revive it.").

[FN197]. Henneaan v. Cooper/T. Smith Stevedoring Co., 837 So. 2d 96 (La. Ct. App. 2003V

[FN198]. See id. at 100-01 (detailing plaintiffs original claim against employer Cooper/T. Smith and this party's third-party claims, ultimately included in plaintiff's petition, against various asbestos manufacturers and an additional former employer of the plaintiff).

[FN199]. Id. at 100, 101.

[FN200]. See id, at 101 (detailing dismissals of claims against City of New Orleans, Eagle, Inc., and "[o]ther defendants . . . dismissed without prejudice before trial" and presumably not listed in the court's opinion).

[FN201]. Id.

[FN202]. Id. at 100.

[FN203]. Id. at 101.

[FN204]. Id.

[FN205]. See id. (detailing trial court's liability determination and not mentioning role of defendant Owens Corning Fiberglass).

[FN206]. Id. at 111 (quoting trial court's Reasons for Judgment).

[FN207]. See id. at 101 (amount also increased by unspecified amount of prejudgment interest).

[FN208]. See id. at 111 ("Under a claim of solidary liability, the risk of non-collectability of the judgment against the party not named by the plaintiff rests with the solidary obligors").

[FN209]. Id. (quoting trial court's Reasons for Judgment).

[FN210]. See Henneqan v. Cooper/T. Smith Stevedoring Co., 837 So. 2d 96, 111 (La. Ct. App. 2003) (stating that in Mayo a state appellate court "held that limiting the plaintiffs' recovery to percentages of fault attributable to the named defendants was inconsistent with maritime solidary liability").

[FN211]. Id.

[FN212]. Id. (citing Coats v. Penrod Drilling Corp., 61 F.3d 1113 (5th Cir. 1995)).

[FN213]. See Coats, 61 F.3d at 1122 (detailing appellant's claim for modification of trial court's judgment "by limiting [plaintiffs] ability to recover the entire judgment from either [appellant or the immune codefendant] in proportion to [plaintiffs] own contributory negligence"); id. at 1139 (affirming trial court).

[FN214]. See id. at 1123 (detailing appellant's rejected allocation rule, which would make "a partially-negligent plaintiff . . . bear part of the risk of noncollection, rather than placing the entire burden upon the defendants").

[FN215]. See Mayo v. Nissan Motor Corp., 639 So. 2d 773, 786 (La. Ct. App. 1994) ("[W]e hold that imputation of Reverand Mayo's negligence to Mrs. May on the basis of the marital relation would be improper."),

[FN216]. Hennegan, 837 So. 3d at 111 (citing McDermott. Inc. v. AmCivde. 511 U.S. 202, 210 n. 10

[FN217], See McDermott. 511 U.S. at 210 n. 10 (stating that the result "could be seen as mandated by principles of joint and several liability" but that "[nevertheless, McDermott has not requested that River Don pay more than its 38% share of the damages"). The Court ultimately resolved the matter by stating that the "best way" of viewing AmClyde's damage waiver was "as a quasi settlement in advance of any tort claims." Id.

[FN218]. See id. at 221 ("Unlike the rule in Edmonds, the proportionate share rule announced in this

opinion applies when there has been a settlement. In such cases, the plaintiffs recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement.").

[FN219]. Hennegan v. Cooper/T. Smith Stevedoring Co., 837 So. 2d 96, 111 (La. Ct. App. 2003).

[FN220]. McDermott. 511 U.S. at 215.

[FN221]. Hennegan, 837 So. 2d at 111.

[FN222]. Garlock challenged the court's failure to include defendants that were absent from the litigation. See id. at 110-11 (detailing Garlock's claim that "the trial court erred in finding Garlock liable for ail of Mr. Hennegan's damages and by failing to apportion an appropriate share to the remaining defendants" and noting that maritime law considers fault of ail defendants "regardless of whether they settled before trial"). Though Garlock also argued that the trial court should have found both that the two settling defendants were liable and that Cooper/T. Smith was more than 20% liable, see id. at 111-12 (detailing claims on appeal concerning fault determinations), the appellate court did not find error in the trial court's liability allocations, id. Thus, the only claim adjudicated by the court's holding concerned the "remaining" defendants, id. at 110, non-parties and the bankrupt Owens Corning not at all considered by the trial court. "When an opinion issues for the Court, it is not only the result

but also those portions of the opinion necessary to that result by which we are bound." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996); see also Doerr v. Mobil Oil Corp., 774 So. 2d 119, 128 (La. 2000) ("Under the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a 'constant stream of uniform and homogenous rulings having the same reasoning,'jurisprudence constante applies and operates with 'considerable persuasive authority.'" (quoting James L. Dennis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent, 54 La. L. Rev. 1, 15 (1993))).

[FN223]- See, e.g., Conn. Gen. Stat. Ann. § 52-572h(q) (West Supp. 2001) (providing that an insolvent's share of damages be allocated proportionately among all the other defendants); Gauthier v. O'Brien, 618 So. 2d 824, 832 (La. 1993) (holding that the damages attributed to an immune employer should be reallocated to other defendants on a relative fault basis), overruled by Cavalier v. Cain's Hydrostatic Testing, Inc., 657 So. 2d 975, 983 (La. 1995) (holding that state's apportionment statute does not require the inclusion of an employer in the factfinder's liability allocation).

[FN224]. Paradise Valley Hosp. v. Schlossman, 191 Cal. Rptr. 531 (Cal. Ct. App. 1983). In Paradise Valley Hospital, California's Fourth District Court of Appeals considered the apportionment of an insolvent defendant's share of damages among the remaining, solvent defendants. Id. at 532. Plaintiffs sued a hospital and two doctors in negligence and recovered a verdict for $1.5 million. Id. at 533. One

doctor, 50% responsible for the plaintiffs' injury, filed for bankruptcy. Id. The hospital, 10% responsible, paid $500,000, and the other doctor, 40% responsible, paid $1 million to satisfy the judgment. Id. The hospital and the solvent doctor cross-complained for contribution for the amounts that each had paid in excess of its proportionate share of damages. Id. The court reasoned that California's adoption of comparative negligence did not "compel the demise" of joint and several liability. Id. Rejecting the position that the insolvent doctor's share of damages should be divided equally between the two solvent defendants, the court ruled that the "next logical extension" of comparative fault required the division of the insolvent doctor's share of damages between the solvent defendants proportionate to those defendants' comparative faults. Id. at 536. The hospital, 10% responsible, should pay $300,000 in damages (it's $150,000 share of the $1.5 million judgment and 20% of the insolvent's $750,000 share), and the solvent doctor, 40% responsible should pay $1.2 million in damages (his $600,000 share of the $1.5 million judgment and 80% of the insolvent's $750,000 share). Id.

[FN225]. Id. at 532.

[FN226]. Id. at 536.

[FIM227]. Id.

[FN228]. Id.

[FN229]. Id. at 535 (citing Victor E. Schwartz, Comparative Negligence § 16.7, at 261 (1st ed. 1974)).

[FN230]. Harry N. Zavos, Comparative Fault and the Insolvent Defendant: A Critique and Amplification of American Motorcycle Association v. Superior Court, 14 Loy. LA. L. Rev. 775, 817 (1981).

[FN231]. Pierrinaerv. Hoger, 124 N.W.2d 106 (Wis. 1963). In Pierringer, the Wisconsin Supreme Court reviewed contribution claims asserted by nonsettling parties against defendants that settled with releases discharging the portion of the plaintiffs damages caused by the settling parties' negligence. Id. at 108. The plaintiffs had been injured in an explosion allegedly caused by multiple defendants. Id. at 107. All defendants, except one, settled before trial using such releases and sought dismissal of the contribution claims asserted against them. Id. The court ruled that settlement for a defendant's share of liability barred contribution claims asserted against that defendant. See id. at 112 (ruling that trial court's grant of summary judgment was not erroneous). The release agreements provided that the plaintiff would satisfy any portion of a judgment against a nonsettling party that was in excess of that party's proportionate share of damages, so the court ruled that a trial court should give the release "immediate effect" and enter judgment only for the nonsettlor's proportionate share of damages. Id.

[FN232]. See id. at 111 (rejecting nonsettling codefendant's argument that prior case law allowed its contribution action to proceed against settled codefendants).

[FN233]. Id. at 108 (quoting language of release).

[FN234], See id. (construing release language and noting the superfluity of provisions providing for the indemnification of a settling defendant).

[FN235]. See id. at 111 (holding that the trier of fact must determine the settling parties' liabilities because contribution actions are barred).

[FN236]. See id. at 112 (holding that the failure to include a settled party in liability apportionment was prejudicial error).

[FN237]. See In re Exxon Valdez, 229 F.3d 790, 797 (9th Cir. 2000) (Pierringer releases have the effect of reaching a proportionate share result. . . ."); Peter B. Knapp, Keeping the Pierringer Promise: Fair Settlements and Fair Trials, 20 Wm. Mitchell L. Rev. 1, 3 (1994) (reviewing key components of Pierringer releases); see also Daniel Levf, Note, A Comparison of Comparative Negligence Statutes: Jury Allocation of Fault-Do Defendants Risk Paying for the Fault of Nonparty Tortfeasors?, 76 Wash. U. L.Q. 407, 418-20 (1998) (reviewing the characteristics of Pierringer releases and noting the impropriety of using pro tanto credits with them).

[FN238], See Knapp, supra note 237, at 26 (noting that courts are split regarding the allocation of insolvent and immune parties' shares under Pierringer releases).

[FN239]. Frederickson v. Alton M. Johnson Co., 402 N.W.2d 794, 798 (Minn. 1987).

[FN240]. Id. at 796.

[FN241]. Id.

[FN242]. See id. (stating that the two Issues considered are the appropriateness of verdict reduction and the reallocation of uncollectible portions of the judgment).

[FN243]. Id. at 797 (quoting Hosley v. Armstrong Cork Co., 383 N.W.2d 289, 292 (Minn. 1986)).

[FN244]. Id.

[FN245]. Id. at 797-98 (quoting Minn. Stat. § 604.02 (1984)).

[FN246]. W. at 798.

[FN247]. See id. (ruling that a plaintiff may recover only from the nonsettling defendant because a release "to the extent of" another solvent defendant's liability encompasses the uncollectible damages reallocated to the settling defendant).

[FN248]. Id. at 797-98 (quoting Minn. Stat. § 604.02 (1984)).

[FN249]. See McDermott, Inc. v. AmClyde, 511 U.S. 202, 221 (1994) (holding that joint and several liability can result in one defendant paying more than its equitable share of damages when a plaintiffs recovery is limited by factors outside the plaintiffs control); supra notes 42-43 and

accompanying text (discussing Edmonds's resolution of joint and several liability among defendants).

[FN250]. See Frederickson v. Alton M. Johnson Co., 402 IM.W.2d 794, 798 (Minn. 1987) (ruling that a Pierringer settlement includes a settled defendant's liability share after increase from the realiocation of an uncollectible portion of damages).

[FN251]. Austin v. Raymark Indus., Inc., 841 F.2d 1184 (1st Cir. 1988). In Austin, the U.S. Court of Appeals for the First Circuit considered the effect of settlement with Pierringer releases on the reallocation of an insolvent defendant's share of damages. Id. at 1187. The plaintiff, the widow of an asbestos worker who died from lung cancer, sought recovery from sixteen asbestos suppliers. Id. at 1185. Prior to trial, she settled with eight defendants using Pierringer releases. Id. at 1188. One defendant, Unarco, did not settle before trial. Id. at 1185. Unarco was in bankruptcy proceedings and was found 60% responsible for injury to the plaintiffs husband. Id, at 1195. The court ruled that Unarco's share of damages should be reallocated to the other defendants proportionate to those defendants' comparative fault. Id. at 1196. Because the plaintiff had agreed to "stand in the shoes" of the defendants settling with Pierringer releases, the verdict was reduced by the portion of Unarco's damages reallocated to them. Id.

[FN252]. Id. at 1188.

[FN253]. Id. at 1185.

[FN254]. See id. at 1195-96 (reviewing the trial court's allocation of an insolvent defendant's share of damages and noting that a "powerful principle []" of Maine law is the full compensation of plaintiffs by means of joint and several liability),

[FN255]. See id. at 1196 (holding that reallocation relative to proportionate fault accords with goals of full compensation and comparative negligence),

[FN256], Id. at 1195.

[FN257]. See id. at 1196 (reasoning that the plaintiff agreed to "stand in the shoes" of settling parties and, therefore, she must "be held responsible" for the uncollectible damage shares attributed to them).

[FN258]. See id. (holding that, for example, the verdict should be reduced by a settled defendant's 22% share of proportionate liability and an additional 9% share attributed to the settled defendant because of a codefendant's insolvency).

[FN259]. See id. (reasoning that the reduction of the award did not deprive the plaintiff because she had assumed all obligations of the settled parties).

[FN260]. See Hoerr v. Northfield Foundry & Mach. Co., 376 N.W.2d 323, 332 (N.D. 1985) (reasoning that a Pierringer-type release does not require the imputation of insolvent or immune defendants' shares to a plaintiffs prior settlement because the plaintiff would not "expect [this] as a natural consequence" of release); Chart v. Gen. Motors Corp., 258 N.W.2d 680, 687 (Wis. 1977) (holding that courts

may not impute an insolvent defendant's share of damages to settled defendants because no requirement exists that defendants share in a codefendant's insolvency proportionately).

[FN261]. See Hoerr, 376 N.W.2d at 332 (reasoning that plaintiffs would not expect such a reduction "as a natural consequence" of settlement),

[FN262]. Id. at 331-32 (construing N.D. Cent. Code S 32-38-04(2) (1996) and Bartels v. City of Williston, 276 N.W.2d 113. 122 (N.D. 1979).

[FN263]. See id. at 332 (holding that a plaintiff would not view such a reduction as a "natural consequence" of settlement),

[FN264]. Chart, 258 N.W.2d at 687.

[FN265]. Id. at687n,9 (discussing Bielski v, Schulze, 114 N.W.2d 105, 107 (Wis. 1962),

[FN266]. Id. at 687.

[FN267]. See id. at 687-88 (reasoning that requiring a plaintiff to "step into the shoes" of a settled defendant would defeat the plaintiff's motive to settle because the value of the release would be contingent on the outcome of a lawsuit).

[FN268], See Siler v. Northern Trust Co., 80 F. Supp. 2d 906, 909 (N.D. Ill. 2000) (stating that one fundamental characteristic of a Pierringer release is that nonsettling defendants "pay no more than their fair share of the verdict").

[FN269]. Knapp, supra note 237, at 31; see also supra notes 107-11 and accompanying text (discussing allocation of the risk of insolvency).

[FN270]. Knapp, supra note 237, at 30.

[FN271]. See id. at 30-31 (noting increased uncertainty because of insolvency and stating that Minnesota's system, allowing settling parties to allocate the risk of insolvency among themselves, is "preferable").

[FN272]. See id. at 31 (noting the fundamental unfairness of allowing settling parties to allocate risks to nonsettling parties).

[FN273]. See Chart v. Gen. Motors Corp., 258 N.W.2d 680, 687 (Wis. 1977) (stating that imputation is based on the assumption of apportionment of an insolvent's share of damages and, further, that "no rule" provides for the apportionment of an insolvent's share of damages or contribution to a defendant forced to pay an insolvent's share).

[FN274]. See Hoerr v. Northfieid Foundry & Mach. Co., 376 N.W.2d 323. 332 (N.D, 1985) (reasoning that a plaintiff would not expect a reduction in the verdict of more than a settled defendant's share of liability).

[FN275]. See McDermott. Inc. v. AmClyde, 511 U.S. 202. 220 (1994) (stating that this characteristic is a "virtue" of proportionate share apportionment).

[FN276]. See id. at 221 (stating that defendants' burdens do not change if a plaintiff's settlement is "meager" or "generous").

[FN277], See id. at 213 (reasoning that settlements will often deviate from trial outcomes for various reasons).

[FN278]. Id. at210n.10.

[FN279]. Id.

[FN280]. Id. at 221.

[FN281]. Id.

[FN282]. Cf. Donald K. Hill, Law School. Legal Education, and the Black Law Student. 12 T. Marshal! L. Rev. 457, 486 (1987) ("The objective is accomplished by the method itself. To the student's question, 'What is the answer, Prof.?,' I pose the proposition, The answer is the question.'").

[FN283]. Supra note 87. Some of Ken Kesey's literature also conveys this theme. In One Flew Over the Cuckoo's Nest, Kesey tells the story of Patrick McMurphy, who teaches other patients in a mental health facility to question the internal controls of the "Big Nurse." As the story develops, many of the characters ultimately reject the Big Nurse's rules and procedure, instead choosing to live according to their own dictates. Ultimately, the characters and the reader come to recognize the Big Nurse's ward as its own alter-reality, complete with pronouncements of right and wrong. The reader thus faces the idea that

the frame of reference in which people operate can change, and that its change can bring about dramatically different viewpoints for the people involved. See generally Ken Kesey, One Flew Over the Cuckoo's Nest (1962).

[FN284]. Cf. M'Culloch v. Maryland, 17 U.S. *(4* Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is a constitution we are expounding.").

END OF DOCUMENT

Ex. 3

U.S. Department of Transportation
**Maritime Administration**

**Certificate of True Copy**

I HEREBY CERTIFY *that the annexed* is a true copy of a document entitled "Minimum Requirements for Safety and Industrial Health in Contract Shipyards", consisting of thirty-five pages, as it appears on file.

*In the Maritime Administration, U.S. Department of Transportation*

*IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Maritime Administration to be affixed, on the day and year below written.*

/s/
Secretary
Maritime Administration

Washington, D.C. October 4, 1983

Form MA-93
(Rev. 9-82)

PLAINTIFF'S EXHIBIT GOV-1

**DEFENDANT'S EXHIBIT B**

# U.S. Navy Department - U.S. Maritime Commission

## *Minimum Requirements*

## FOR

## SAFETY AND INDUSTRIAL HEALTH

## IN

## CONTRACT SHIPYARDS

| Approved | Approved |
|---|---|
| U.S. Navy | U.S. Maritime Commission |
| Jan. 20, 1943 | Feb. 9, 1943 |

United States Government Printing Office -
Washington – 1943

| U.S. Navy Department | U.S. Maritime Commission |
|---|---|
| Washington, D.C. | Washington, D.C. |

*To All Contractors Constructing Ships for United States Navy – United States Maritime Commission;*

As a result of the national conference on safety and health in shipyards holding contracts with the United States Navy and Maritime Commission, conducted under the auspices of these agencies in Chicago December 7 and 8, 1942, a unanimous agreement was reached upon the minimum standards which have now been approved by the Navy Department and United States Maritime Commission and which should be put into effect in shipyards holding contracts with the two agencies.

These standards represent a specialized study based upon a fact-finding survey on all coasts by experts in that field. They have received the unanimous concurrence of the representatives of the medical and safety departments and of labor-management committees from shipyards on all costs.

The necessity for conserving manpower and promoting the physical welfare, health, and safety of what shortly will amount to one million workers in shipyards requires that careful observance of standards for the prevention of accidents and protection of health be accorded. Aside from the weight which must be given humanitarian considerations, it is simply good common sense that as much care and attention be given to protecting the human factors in the war production program as is given machines.

Under the administrative direction of the Maritime Commission, safety and industrial health consultants will be made available in all regions wherein shipyards holding contracts with the Navy and the Commission are located.

Each contractor is hereby given notice that the Navy Department and the Maritime Commission will expect full and complete compliance with the minimum standards which bear the approval of the Navy Department and the Maritime Commission, and each is requested to give full cooperation to the consultants on health and safety who will be charged with the coordination and supervision of the safety and health programs of the two agencies.

The cumulative restriction of manpower makes speedy attention and comprehensive action in respect to the subject matter hereof of vital importance.

FRANK KNOX, *Secretary of the Navy.*

E. S. LAND, *Chairman,*
*U.S. Maritime Commission.*

## UNITED STATES NAVY - MARITIME COMMISSION

## MINIMUM REQUIREMENTS

## FOR

## SAFETY AND INDUSTRIAL HEALTH IN CONTRACT SHIPYARDS

S and H-1. Introduction.

1.1 The standards for industrial health and safety as presented in this manual cover only minimum requirements. It is not to be assumed that compliance with these minimum standards is insurance of the development of good health and safety records.

1.2 It is recognized that in many shipyards, standards for health and safety are already in effect which go beyond the requirements of those listed here. The Maritime Commission and Navy urge that any standards of higher level be continued and that where substandard conditions of health and safety exist, they immediately be brought to the required standard or better.

1.3 In all cases the use of the words *shall* or *must* indicates that compliance with that section of the minimum requirements is mandatory. Where the words *should* or *may* are used the section may be considered desirable but not necessarily mandatory under certain circumstances which the contractor in his discretion may determine.

## MINIMUM REQUIREMENTS FOR INDUSTRIAL HEALTH

H-2. Medical Facilities.

2.1 *Personnel.*—Yards employing up to 5,000 men should have two full-time physicians, and one additional physician for each additional 5,000 men. Yards with less than 2,000 to 3,000 men will not need full-time physicians.

2.2 Specialists in the various branches of the medical profession available in the area should be consulted as indicated.

2.3 Yards employing up to 5,000 men should have in the main dispensary six full-time nurses and three additional nurses for each additional 5,000. Additional nurses will be required for first aid stations.

2.4 There should be at least three clerks employed in the medical department for each 5,000 employees.

2.5 One ambulance driver should be available per ambulance per shift.

H-3. Physical Facilities.

3.1 The medical department should be provided with:

*a.* A waiting room with suitable registration facilities.

*b.* A general treatment room.

*c.* An eye treatment room.

*d.* A minor surgery room.

*e.* A ward with three beds for the first 5,000 employees, and one bed for each additional 10,000.

*f.* Doctors' offices and private examining rooms.

*g.* A nurses' office and dressing room.

*h.* X-ray room for yards employing 5,000 men and above.

*i.* A physiotherapy room.

*j.* Toilet facilities for doctors, nurses and patients.

*k.* A storeroom for general medical stores.

*l.* X-ray files and viewing room.

3.2 First aid treatment rooms, manned by nurses, should be provided wherever there is overcrowding at the main dispensary and loss of time due to distance from shipways and shops. These sub-stations may be locate4d under building

ways or near locations where the number of men working is large so that the distance a man need travel to a sub-station will not exceed approximately 400 yards.

H-4. Equipment

4.1 The following equipment should be provided:

*a.* One ambulance for each 15,000 employees, or reasonable fraction thereof, with an ordinary passenger car always in reserve.

*b.* In some yards a station wagon is used satisfactorily inside the yard and an ambulance used only for trips outside.

*c.* An X-ray unit for yards employing about 5,000 men and above.

*d.* Medical and surgical stores required for minor surgery, eye injuries and physiotherapy.

H-5. Records and Forms.

5.1 The following records and forms are recommended:

NOTE. – *In an emergency no form need be filled out.*

*a.* A form authorizing the workman to report to the medical department for examination or treatment issued by a foreman or leading man or other supervisor. This shall show time of issue, arrival at dispensary, discharge from dispensary and return to work.

*b.* Appointment form for revisits and retreatments issued by the physicians and nurses.

*c.* A disposition form issued by physicians and nurses indicating return to work, hospitalization, to home, or other disposition.

*d.* A complete and accurate permanent filing system recording personal data, nature and cause of injury, diagnosis, treatment, disposition, and results.

*e.* The necessary state and insurance company forms.

*f.* Daily report to the safety department showing all new cases for the day, together with the nature and cause of injury, and the *diagnosis.*

*g.* The adoption of the standard nomenclature when made available by the Council on Industrial Health of the American Medical Association, Chicago, Illinois.

H-6. Examinations.

6.1 Physical examinations to insure proper placement of employees shall be given.

6.2 Periodic check examinations shall be given men working in occupations potentially hazardous to themselves or others, as for example to crane operators, locomotive and hoisting and portable engineers. Periodic check examinations should be given men in jobs in which there may be health hazard, as for example to sand blasters, radium and X-ray workers, and paint sprayers.

6.3 Special examinations such as X-ray, seriologic and urinalyses shall be given in the individual case as indicated and in accordance with local needs.

H-7. Air Raid Precautions.

7.1 The medical department shall locate, equip, and maintain such emergency first aid dressing stations as may be deemed necessary to handle air raid casualties.

7.2 A certain number of yard employees shall be trained in first aid procedures to render assistance to the medical department in handling air raid victims.

7.3 Close cooperation should be maintained with the local civilian defense officials in order that evacuation and care of air raid victims may be carried out to the best advantage.

7.4 In keeping with local army and navy regulations, steps should be taken to provide protection of dispensaries by sandbags, or otherwise, from fragments and concussion of bombs.

H-8. Responsibilities of the Medical Services.

8.1 Frequent inspection of the yard by the medical staff shall be required in order that physicians may become familiar with shipyard jobs and thus help intelligently in preventing accidents and occupational disease.

8.2 Close collaboration shall be maintained with the safety department especially in regard to records of accidents and absenteeism.

8.3 It shall be the joint responsibility of the medical and safety departments through the supplies department to know the composition of paints, thinners, paint removers, and other chemicals used in the yard, and to see that the workers exposed are protected by the best safety practices.

8.4 As in the general practice of medicine the confidential relations of doctor and patient shall be maintained.

8.5 It is certain that in the near future women in large numbers are to be employed in the mechanical trades. It is necessary in shipyards to make special provisions for this class of patients. This will necessitate the establishment of separate waiting, treatment, and examining rooms. In yards where the number of employees is large, it may be logical to establish a separate dispensary for the handling of women patients.

H-9. Sanitary Inspections.

9.1 *Cafeterias and canteena.* – It shall be the duty of the medical department to adapt from Army and Navy standards, in reasonable conformity with the local health department rules, and inspection scheme to include preemployment examination of food handlers, quality and quantity of food, general cleanliness and comfort, screening, dishwashing, garbage and waste disposal. These inspections shall be made at unscheduled times and never less than once each week.

9.2 *Water supply, sewerage, and waste disposal.* – In cooperation with Maritime and Navy engineers

the medical department shall inspect and report upon the above as often as seems advisable, but not less than twice yearly.

9.3 *Salt tablets.* – Salt tablets shall be made available to all employees and shall be kept in covered dispensers appropriately located.

H-10. Respiratory Protective Equipment for Shipyards.

The U.S. Bureau of Mines, 4800 East Forbes Street, Pittsburgh, Penns., maintains a laboratory which tests and *approves* for use in industry respiratory protective equipment of all kinds. The Maritime Commission and Navy will require the use of *approved* equipment throughout all yards. The safety department shall be responsible for instructing men in the proper use of such equipment and for the maintenance of ample supplies.

10.1 Details of Bureau of Mines respirators with names of manufacturers, prices, and descriptions can be obtained from the Bureau or from the Maritime Commission.

10.2 The safety department shall be responsible to the management for cleaning and sterilizing all such equipment as often as may be agreed upon with the medical department. (A method for such sterilization is included in these standards; see section H-12.0)

10.3 *General requirements for respirators.* –

*a.* Adequate protection as defined by American Standard Safety Code for the Protection of Heads,

Eyes, and Respiratory Organs. Handbook H-24, Nov. 1, 1938. Superintendent of Documents, Washington, D.C.; price 15¢

*b.* Comfort (light weight and not obstructive to vision).

H-11. Jobs Requiring Respiratory Protective Equipment.

11.1 *Dust.* –

| **JOBS** | **PROTECTIVE DEVICES** |
|---|---|
| Silica of Sand Dusts (as in sand blasting) | (1) Abrasive blasting helmets.<br>(2) Dust respirator. |
| Lead Dust (as in mixing paint) | (1) Air line respirator.<br>(2) Lead dust respirator. |
| Asbestos (as in covering pipes) | (1) Air line respirator.<br>(2) Dust respirator. |

11.2 *Metal fumes and smokes.* –

| **JOBS** | **PROTECTIVE DEVICES** |
|---|---|
| Lead and rinc odixe from welding and burning | (1) Air line respirator.<br>(2) Fume respirator for lead.<br>(3) Dust respirator for sine oxide. |

11.3 *Solvent vapors.* –

| JOBS | PROTECTIVE DEVICES |
|---|---|
| Spray painting, both Indoors and outdoors. | (1) Air line respirator.<br>(2) Chemical cartridge respirator. |
| Paint removing, Usually indoors | |
| Cementing, usually indoors. | |
| Cleaning, usually indoors. | |
| Degreasing, usually indoors. | |

11.4 *Acid gases and mists.* –

| JOBS | PROTECTIVE DEVICES |
|---|---|
| Pickling (indoors) | (1) Mist respirator<br>(2) Chemical cartridge respirator. |
| Cleaning (indoors) | |
| Degreasing (indoors) | |

11.5 *Alkali mists.* –

| JOBS | PROTECTIVE DEVICES |
|---|---|
| Cleaning (indoors) | (1) Mist respirator<br>(2) Chemical cartridge respirator. |
| Degreasing (indoors) | |

11.6 *Asphyxiating atmospheres.* –

**PROTECTIVE DEVICES**

(1) Nose mask.
(2) Oxygen-breathing mask.
(3) All-service mask.

11.7 *Air supply for air-line masks of all kinds.* – Air at a comfortable temperature ad free from odors and excessive moisture sometimes is difficult to furnish, especially for outdoor jobs in winter. Air quality and temperature shall be tested by the Safety Department and shall meet the suggestions of the American Standard Safety Code for air-supplied respirators (sec. 10.3a).

H-12. Sterilization of Respirators.

12.1 Each worker who needs a respirator should be assigned his own respirator. Where this is not done, it is important that the respirator be sterilized in addition to being cleaned. Adequate sterilization may be accomplished by –

*a.* Washing the rubber and metal parts with soap, a brush and warm water, after which the respirator is sterilized by immersion for 10 minutes in a solution of formalin made by placing one part of 40 percent formaldehyde solution into nine parts of water.

*b.* Washing the rubber and metal parts with soap and warm water, after which the respirator is

sterilized by dipping in a 3 percent solution of carbic acid, a 2 percent solution of Lysol, or a 70 percent solution of denatured alcohol.

*c.* Subjecting the respirator to sterilization by a moist atmosphere of antiseptic gas, preferable formaldehyde, for a period of ten minutes at room temperature.

*d.* After following any one of the outlined procedures, the respirator should be rinsed with water and hung up to dry. The respirator should not be used until it has been dried thoroughly.

*e.* The filters, felt screens, and elastic headbands should be removed, if detachable, before washing or sterilization of the respirator, unless it is evident that washing and sterilization will not harm these parts.

12.2 The National Safety Council has issued an Industrial Data Sheet No. D-Gen. 16, "Cleaning and Sterilizing Goggles and Respiratory Equipment."

H-13. A Guide for Prevention of Industrial Disease in Shipyards.

13.1 Eight common types of disease and methods for their prevention are given in the following sections. Help in applying these methods will be given by the local Safety Department and by safety and medical consultants of the Navy Department and the Maritime Commission.

13.2 *Flashburns and foreign bodies in the eye.* –

*a.* Effects on workers: "Flash" is a surface eye burn resulting from even momentary unprotected exposure to the welding arc. In this condition the eye is painful and sensitive, especially to light. An eye flash shall be treated only by the doctor or by methods he has prescribed.

*b.* Foreign bodies in the eye shall be removed only under the doctor's orders or by methods he has prescribed. Like flashburns, they are preventable.

*c.* For safe practice:

All workers:

1. Whenever near welding areas wear antiflash goggles which have been approved by the Safety Department.

2. Wear safety goggles when grinding, chipping, buffing, scratch-brushing, or forging.

Welders:

3. Wear approved antiflash goggles even when helmet is being worn.

4. Use portable screens to protect the eyes of fellow workers.

13.3 *Lead poisoning.* –

*a.* Sources: In general, any job in which dust, fume, or smoke from any substance containing lead is breathed daily.

*b.* For example:

| JOB | WHEN MATERIAL IS: |
|---|---|
| Welding | Metal, coated with paint |
| Cutting | containing lead. |
| Burning | Lead. |
| Shrinking | Lead pigments. |
| Grinding | |
| Buffing | |
| Spray painting | |
| Mixing paint pigments | |

*c.* Jobs can be done safely with:

1. (a) Special ventilation: Use a local exhaust hood approximately 8 inches from the job and drawing at lease 200 c.f.m. into the hood with filtration of the discharge, or discharge, to a place where the contaminated air will not be breathed, or

   (b) Wearing of fume respirators, or,

   (c) Wearing of supplied air respirator.

2. Periodic medical examination which included blood and urinalyses.

13.4 *Solvent vapors.* –

*a.* Sources: In general, any job in which solvent vapors are breathed. For example:

Spray Painting.
Painting.

Using paint remover.
Applying cements.
Paint brush and spray gun cleaning.

*b.* Job can be safely done with:

1. Segregation of such work, and

2. (a) Special ventilation as may be required.

(b) Provision of spray booths with exhaust system.

(c) Wearing of special respirators:

(1) For spray painting: Supplied air respirators or air line hoods.

(2) For other jobs: Chemical cartridge respirators.

(See H-10 on respiratory protective equipment)

13.5 *Zinc fume fever (zinc chills or shakes).* –

*a.* Sources: In general, any job in which the fumes from heated zinc are breathed. For example:

| JOB | WHEN MATRERIAL IS |
|---|---|
| Welding | Galvanized metal |
| Cutting | Zinc |
| Shrinking | Zinc alloy |
| Pouring zinc alloys | Brass |

*b.* Job can be safely done with:

1. Special ventilation: Local exhaust hoses or hoods located close enough to operation at all times to remove smoke completely.

2. Wearing of special respirators.

NOTE. – There are no known cumulative effects from zinc chills.

13.6 *Fiberglass.* –

*a.* Effects on workers: Men working with Fiberglass may develop a dermatitis or conjunctivitis which are skin and eye conditions. It is best to transfer to another job those who continue to be sensitive.

1. Both experimental and practical evidence show conclusively that the inhalation of Fiberglass causes no lung damage.

2. The cement used with Fiberglass may contain a toxic solvent such as carbon tetrachloride ($CCL_4$) which can cause severe illness or even death if the cement is used indoors with inadequate ventilation.

*b.* For safe practice:

1. Clothing: Supply loose coveralls with collars and sleeves buttoned over cheesecloth.

2. Goggles: Should be worn.

3. Shower: Should be taken rather than bath, at end of shift. Respirators are usually not necessary, *but* if a cement containing a toxic solvent is used, proper protection either by ventilation or by a respirator must be supplied and used.

13.7 *Asbestoris*. –

*a*. Sources: In general, any job in which asbestos dust is breathed. For example:

| JOB: | WHEN MATERIAL IS: |
|---|---|
| Handling. | Asbestos |
| Sawing. | Asbestos mixtures. |
| Cutting. | |
| Molding. | |
| Welding rod salvage. | |

*b*. Job can be done safely with:

1. Segregation of dusty work and,

2. (a) Special ventilation: Hoods enclosing the working process having linear air velocities at all openings of 100 feet per minute, or

(b) Wearing of special respirators

13.8 Silicosis. –

*a.* Sources: In general, any job in which the dust of free silica (sand) is breathed daily. For example:

JOB

Sand-blasting
Sand packing of pipes
Shot blasting of castings

*b.* Job can be done safely with:

1. Isolation of dusty process and, in addition,

2. Special ventilation: In the case of sand-blasting, the work should be done in the standard type of sand blast room, cabinet, or machine.

3. Special respirator for dust-containing free silica.

4. Periodic examination by doctor.

13.9 Dermatitis. –

*a.* Sources: Excessive or improper use of cleaning agents such as gasoline. It is not at all uncommon to find dermatitis caused by excessive use of common soaps such as those used in laundering. Cutting oils, certain greases, certain insulating materials used on electric cables and conduits can cause dermatitis.

*b*. Job can be done safely with:

1. Precautions against excessive use of the causative agent.

2. Advice of the medical department in the use of protective salves and creams.

H-14. Ventilation Standards

14.1 Ventilation is required to control temperature and to remove air impurities, as from welding and paint spraying.

14.2 The maintenance of proper working conditions shall be the responsibility of the safety department, whose staff shall work in close cooperation with the welding, paint, and electrical departments. Air analyses and tests shall be made by the safety and medical consultants of the Navy Department and the Maritime Commission as may be needed.

14.3 Personnel of Department. –

*a*. Number:

1. The size of the ventilation crew will vary with the type of ship, equipment available, etc. The head of the safety department will be responsible for the organization of the safety department or division.

2. There shall be a ventilation supervisor on each shift responsible to the head of the safety department. Under the

supervisor there shall be a sufficient crew to inspect and maintain good working conditions.

3. An EC-2 ship shall have at least one ventilation man aboard. Larger ships, or ships like carriers with considerable galvanized welding, shall have at least two ventilation men.

4. The number of ventilation men on the night shifts shall be in proportion to the construction crews.

5. The ventilation crew must have available a maintenance and repair crew of sufficient size to keep equipment on the job and operating efficiently. Long waits during which equipment is idle must be avoided.

*b.* Training:

1. The ventilation supervisor (that is, the safety engineer) shall be trained to handle the entire ventilation program in the yard. Local educational institutions, State Industrial Hygiene Unites, Maritime Commission engineers, and other sources are available to give this training.

2. The ventilation supervisor shall organize classes, demonstrations, and short talks on standard procedures for ventilating specific spaces on the ships.

14.4 *Type of equipment needed.* – In ship construction, two types of ventilation are used – local exhaust as for removal of welding fumes at the point of origin, and general ventilation to supply fresh air to confined working spaces.

*a.* Local exhaust:

1. A common length for a local exhaust hose is forty feet. In ordering exhaust fans for use with local exhaust hoses, the following specifications should be met: Capable of drawing a minimum of 200 c. f. m. through each of 3-inch (or 4-inch) diameter flexible hose. Fans should have provisions for attaching three or more local exhaust hoses per unit.

2. In the interests of power economy, it is understandable to move much more than 200 c. f. m. through each local exhaust hose.

*b.* General ventilation:

1. It is frequently desirable to introduce air into large working spaces such as deep tanks, fore- or after-peaks. This is done in many yards by using a flexible fabric duct, with metal elbows, and a fan of about 5,000 c. f. m. capacity.

2. It is desirable sometimes to supply a quantity of fresh air into the double

bottom. Here a 2,000 c. f. m. unit may be used.

3. These two examples represent the two extremes of this type of work, and therefore are the two extremes in fan sizes. Fan static pressures in each case should exceed four inches of water.

4. For general ventilation of a ship engineroom during construction, a 10,000 c. f. m. blower is recommended. On the other hand, operations in confined quarters where heat is generated (plate shrinking, for example) may use a small portable fan to circulate the air. For this purpose, small blowers of from 800 to 1,500 c. f. m. shall be provided.

*c.* Ventilating procedures:

1. Local exhaust shall be used whenever a welding operation is being conducted in a confined space, or whenever galvanized metal is being welded. Local exhaust is always a suction process. Never blow a stream of air upon a welding arc.

2. Many welders think that it is enough to hold the end of the suction hose in the same compartment with the welding operation. This is not so. In order to capture the welding fumes, the end of the hose must be within six or eight

inches of the arc, assuming a 200 c. f. m. volume per hose. Beyond this distance, the suction hose is ineffective.

3. The air supply to a general ventilation fan must be fresh outside air. Recirculation of air already contaminated shall not be permitted. A minimum of 400 c. f. m. per welder shall be supplied to a given working space such as a deep tank when general ventilation is used alone.

4. In warm weather, air movements or drafts are helpful, while in cold weather a minimum of air movement is desired and local exhaust will serve best. In temperate weather, it is most satisfactory to use a combination of local exhaust and general ventilation.

14.5 *Coordination of department with construction program.* –

*a.* The ventilation supervisor shall keep abreast of construction, and thus anticipate the ventilation needs.

*b.* The construction foremen shall inform the ventilation department of ventilation needs before the needs occur.

*c.* Blackboards, boxes, signal lights, or similar devices shall be installed on board and used to inform the ventilation department of immediate needs.

14.6 *Supplementary ventilating procedures.* -

*a.* Ventilating confined spaces, such as the fore- or after-peaks and deep tanks, is greatly simplified by the temporary removal or cutting through of certain plates.

*b.* For example, the fore-peak of a Liberty ship can best be ventilated by cutting a combination access and ventilation hole through the watertight bulkhead near the ship's bottom.

*c.* The tank top can be left off the midship deep tanks until all welding has been completed in this space.

*d.* A side plate can be left or cut out of the engineroom at the bottom deck level.

MINIMUM REQUIREMENTS FOR SAFETY

S-2. Managements Part.

2.1 It is absolutely essential, if a successful accident-prevention program is to be installed and operated, that top plant management take an active and interested part in the work. The same supervision given any other important activity in the shipyard shall be given the safety program.

2.2 The responsibility of management insofar as industrial safety is concerned shall be considered to include –

2.21 The provision of a safe working environment.

2.22 Training of employees for safety.

2.23 Establishment of an accident record and reporting system which will definitely tie into nationally uniform reporting, record, and statistical requirements.

2.24 The appointment, where necessary, of a safety engineer (or a safety director) and staff to install, maintain, and properly supervise an accident-prevention program.

2.25 The issuance of instructions to all division or department heads, foremen, leaders, leadingmen, and to any persons in supervisory capacity, that they are considered responsible for preventing accidents which involve employees working under their direction and requiring them to comply with all of the provisions of the accident prevention program in effect in the shipyard.

2.25 An active and interested participation in safety through –

(a) Review of, and executive action on, safety records.

(b) Regular attendance at safety meetings.

(c) Action upon good or bad departmental safety records through

personal interviews with department heads.

(d) General eltters, for bulletin board posting, addressed to employees and discussions of good or bad yard accident record.

(e) By setting a good example. (Goggles, safety shoes, hard hats and other necessary protective shoes equipment shall be used any executive who exposes himself to yard operations.)

S-3. Safety Direct and Staff

3.1 A full-time safety director (title may be safety engineer or safety inspector, etc.) and staff shall be appointed for all shipyards. (See Section 3.25 for duties and responsibilities.) The safety director shall report to, and be responsible to, the highest ranking managerial executive or his designated representatives.

3.2 The staff in the safety department in addition to the safety director, shall consist of:

3.21 An assistant safety director in yards having 3,000 employees or more except that there shall always be at least one safety engineer per shift.

3.22 One safety engineer (safety inspector) for each additional 1,500 employees. Example: If a yard has 85,000

employees there would be required a safety director and an assistance plus 21 safety inspectors.

3.23 The staff of engineers shall be distributed ove the three shifts in propotion to the number of employees on each shift.

3.24 One clerk and/or stenographer for the first 5,000 employees and one clerk for each additional 7,500 employees. (It is not to be assumed that the time of safety inspectors or the safety director can be spent on clerical detail. All office functions, while adequately supervised by the safety director, should be carried on by clerks so the greatest possible amount of time of the safety director and his staff may be spent in the shipyard.)

3.25 The duties and responsibilities of the safety director shall include:

(a) Complete responsibility for formulating, administering and making necessary changes in the shipyard accident prevention programs within the limits of authority granted by the shipyard management. The safety director shall also be required to correlate the shipyard accident program with the minimum safety and health standards of the United States Navy Department and Maritime Commission.

(b) Submission of regular monthly, weekly or daily reports on the status of safety directly to the general manager or his designated representative.

(c) Acting in an advisory capacity on *all* matters pertaining to safety to the management, general manager, superintendents, foremen, quarter men, leadermen, purchasing department, engineering department, commissary department, or contractors.

(d) Maintenance of the accident record system, making all necessary reports, personal investigation of all fatal or serious accidents, investigation through his staff of all accidents, securing supervisor's accident reports, checking corrective action taken by supervisors to eliminate accident causes.

(e) Supervising, or closely cooperating with the training supervisor in the safety training or all employees. (See Section 6.26.)

(f) Correlating safety work with medical department to insure proper selection and placement of employees.

(g) Making personal inspections and supervising inspections by staff and by special employee committees, for the purpose of *discovering and correcting unsafe conditions or unsafe work*

*practices BEFORE THEY CAUSE ACCIDENTS.*

(h) Exchanging information with other shipyards on best safety methods and consulting with United States Navy Department and Maritime Commission Regional Safety Consultants on safety problems which cannot be solved with methods or information at hand.

(i) Making certain that all federal, state or local laws, ordinances or orders bearing on industrial safety are complied with.

(j) Securing any necessary help or advice from the state labor departments on matters pertaining to safety and health.

(k) Initiating activities that will stimulate and maintain the interest of employees in safety.

(l) Acting as secretary of all safety committees and in such capacity he shall prepare an agenda for each such meeting covering the business to be discussed and, he shall prepare for the record, minutes of each such meeting.

(m) Directing the activities of his staff including the assistant safety director, so that the shipyard accident prevention program will be efficiently

operated. It is expected that the safety director may delegate certain responsibilities to his staff engineers, such as that of acting as secretary of certain of the safety committees. Permission for such delegation of authority is expressly given in the interest of efficiency and for training the safety staff.

(n) Submission of the required reports on the status of safety in the shipyard to the interested government agencies at the time and intervals hereinafter requested.

S-4. Accident Prevention Forms and Reports.

4.1 The safety director shall cause to be designed and put into use at least the following forms and records:

4.11 *Supervisor's report of accident.*--

(a) Giving all vital data on case plus statements as to unsafe act and/or unsafe condition, reason un-safe act or condition was permitted to exist or occur, and the immediate corrective action taken or recommended. (See Form 1.)

* * *

# U.S. MARITIME COMMISSION - - U.S. NAVY
# PRIVATE SHIPYARDS
# SUPERVISOR'S REPORT OF ACCIDENT OR OCCUPATION

Fill out for every disabling injury (or case of occupational disease) whether or not compensable. Answer every question fully. Use other side if necessary. To be mailed with the Monthly Injury Summary (for the month covered in that report) by the 15th of the following month to the Division of Industrial Injury Statistics, Bureau of Labor Statistics, Washington, D.C.

(1) Name of Yard _____
(City) (State)

(2) Name of injured employee _____
Badge No. _____

(3) Occupation _____ Department _____

(4) Date of accident _____ Hour of day _____
a.m. p.m.

(5) Witnesses: Name ____ Badge No. _____

(6) Describe accident or case fully (what injured was doing, what happened, etc.) _____

(7) What unsafe condition caused accident or occupational disease? (Specify: broken ladder, defective, staging, lack of ventilating equipment, etc.) _____

(8) What was done wrong (unsafely) that caused accident or occupational disease? (Specify: failure to wear provided goggles, overloading crane, using mushroomed chisel, failure to use respiratory protective equipment, etc.) _____

(9) Describe resulting injury or occupation disease. (Specify: lacerated hand, broken left

leg, right thumb amputated, lead poisoning, etc.) _____

(10) What have you done to prevent similar occurrences? _____

(11) What do you recommend to prevent similar occurrences? _____

(12) Signed by: _____ Title: _____ Date: _____
Checked by: _____

**FORM 1. (See paragraph a. 4.11a.)**

SAFETY ENGINEER RECOMMENDATION FORM

BLANK SHIPBUILDING COMPANY

To: _____ Location _____
Date _____ Time _____

An inspection of operations under your supervision revealed the following unsafe practices and/or conditions:

NOTE: (Unsafe acts or conditions to be described here and numbered. Badge numbers or names of man involved may be listed.)

Above conditions or practices last observed
(1) _____ (2) _____ (3) _____

Corrected at once? _____ If not, when will corrective action be taken?_____

Signed_____
Safety Department

Date checked _____ Signed_____
Safety Department

(Used only if condition is not corrected at once.)

No. 000

NOTES: (1) Size, approximately 3" x 5"

(2) To be made out in triplicate (See 4.12)

(3) Form need not be filled out if condition is corrected at once unless unsafe act or condition is a repetition or a flagrant violation of safety rules is involved.

(4) If check shows existence of same unsafe act or condition the matter should be referred in writing, to the proper executive for actions.

* * *

4.12 *Safety engineer's recommendation form.-*

(a) Form used by safety staff to record recommendations made during inspection. Used for follow-up. Made in triplicate; one to leaderman or quaterman on job, one to general manager, or other designated executive, one to safety department files after use to check performance. (See Form 2.)

4.13 *United States Navy Department and Maritime Commission monthly injury summary. –*

(a) To be submitted monthly to United States Navy Maritime Commission. (See Form 3 attached.) To include over-all breakdown of predominant accidents, types and causes, accident

frequency, total number of fatal cases, total of lost-time cases and the time lost, etc. *This form to be used also for report to management of shipyard.* To be submitted in triplicate as required on form. (See Form 3.)

**[Form 3 has intentionally been left out of the reproduction of this document]**

(b) The following formula shall be used in determining accident frequency rates for shipyards:

1. Accident Frequency--

$$\frac{\text{Number Disabling Injuries} \times 1{,}000{,}000}{\text{Total Man-Hours Worked for Period Covered}}$$

2. A disabling injury shall be considered to be any injury which results in a man being unable to report for work on the next regular day or shift after the accident, or one which calls for standard time charge being made regardless of whether time is actually lost. If time is lost due to the injury, subsequent to the initial return to work, then the injury shall be accounted as disabling.

4.14 *Minutes of safety committee meetings.*--

(a) Minutes of meetings should show date and time of meeting, names of

those present, action on unfinished business, brief description of new business discussed and action taken or ordered by the committee on each item. The discussion should always include the predominating accident hazards of the yard and the means suggested to control them.

(b) Various committee forms will be made available to shipyards on request.

4.17 These forms and any other others pertaining to industrial safety or health shall be filed and made available to authorized representative of the United States Navy-Maritime Commission upon request.

**S-5. Safety Committees.**

5.1 The safety director, in cooperation with the shipyard general manager, shall cause to be formed and put into effective operation at least the following safety committees.

5.11 *Central safety committee.*--

(a) Membership: management representative (chairman), safety director (secretary), all superintendents, foremen, medical department representative, quartermen or leadermen, and one employee.

(b) Membership of all but management representative, medical

department representative and safety director may be rotated - terms of 2 months each but rotation to be arranged so only 1/3 of committee changes each month.

(c) Meetings: Shall be monthly or more often as necessary.

(d) Duties: This is the policy forming committee for safety work. They review the monthly report as submitted to the United States Navy-Maritime Commission and other records to determine the course of safety work for coming period. They decide such matters as type of safety equipment to be used and how it shall be made available to men, types of safety training to be used, whether accident prevention plan is being adhered to, interplant contest awards, etc. Such committees shall review the investigation on fatal or serious accident and make recommendations. All Committee members are expected to make practical suggestions to improve shipyard safety. They also review reports of other committees to make certain suggestions and recommendations are properly followed through.

(e) Secretary: The safety director shall act as secretary, prepare an agenda, take minutes, prepare a report of

committee meeting, and distribute copies of reports to members. He shall follow through with other committees, the suggestions and recommendations of the central safety committee.

5.12 *Supervisors' safety committee.*--

(a) Membership: Management representative, safety director, medical department representative, superintendents, foremen, quartermen, and leadermen. This is a rotating committee; rotatation should be arranged so all of the supervisory staff serve in their respective periods, i.e., superintendents change each four months, foemen each two months, quarterman and leadermen each month. In no case should an entire group change at one time. Where a department or unit of a department has an unusually poor record then the responsible supervisory staff - superintendent, foremen, quartermen or leaderman should be retained on the committee until their record is at least equal to the shipyard average.

(b) Meetings: Shall be monthly or semimonthly or more frequently, as necessary.

(c) Duties: The primary purpose of this committee is the stimulation and maintenance of interest and the

education of its members in accident prevention. The shipyard accident record shall be reviewed, the predominant types of accidents shall be discussed. Suggestions and recommendations to improve the records are solicited from each member. At least one timely subject must be discussed at each meeting; i.e., such as eye injuries and their prevention, electric shocks, hand tool accidents, etc. Methods of avoiding accidents due to these operations should be presented by the committee members.

(d) The committee shall review reports of all fatal and serious accidents and suggest preventive action. It shall review reports of inspection committees and check on the quality of the suggested corrective action for unsafe conditions or practices reported.

(e) The committee shall carry out the suggestions and recommendations of the central committee.

(f) Outside speakers such as safety engineers, insurance men, State Department of Labor men or men from other shipyards, may be used from time to time to stimulate interest of committee members in accident-prevention work. Sound film strips, motion pictures or other similar media

on safety subjects can and should be used if available and practicable.

(g) Secretary: Same as for central safety committee.

5.13 *Regular inspection committees.*--

(a) Number: One committee for each department and each hull.

(b) Inspection: Weekly or more often as necessary.

(c) Membership: At least two employees and a supervisory employee of each job being inspected. The safety director or staff safety engineer should accompany the committee.

(d) Duties: To inspect their department or hull for the purpose of discovering and having corrected unsafe acts and unsafe conditions likely to cause accidents. On each section of a job they should be accompanied by a responsible supervisory employee. They are observers only-the foremen, quartermen or leadermen shall do all corrective work. Where a condition is discovered on which there is disagreement the superintendent shall make the necessary decision. *Hazards immediately dangerous to health, life or limb shall be corrected by the accompanying supervisor at once.*

(e) The committee shall submit written reports to the safety director and indicate whether accident-producing conditions or practices have been corrected. These reports shall be referred to the supervisory safety committee by the safety director. If necessary because of dangerous conditions, he may refer them at once to the general manager.

5.14 *Special inspection committees.*--

(a) Staging inspectors, electrical inspectors, crane inspectors, boiler inspectors, and others.

(b) Membership: Specially qualified individuals or teams permanently assigned to work. (See paragraph 5.15c.)

(c) Duties:

1. Staging inspectors: Daily or continuous inspections of all stages shall be made on each hull - or other locations where stages are used. Report shall be made of all defects to the responsible supervisor for immediate correction. Copy of the daily report shall be submitted to the safety director.

2. Crane inspectors: Weekly inspections shall be made of all cranes and rigging. Reports shall be submitted to proper department heads for correction of unsafe conditions or practices. Copies of reports on defects shall be made to the safety director.

3. Other inspectors: As above and at indicated frequency.

5.15 *Safety committees—General—*

(a) Committees in addition to those specified in these standards, may be formed and operated if desired.

(b) Representatives on all committees, when of a supervisory status, should be appointed by the shipyard general manager and held responsible by him for active and interested participation in the work of the committee. Employee representation may be secured in the same manner, or by appointment of employee committees, union shop stewards or by election of union members or by any other feasible means.

(c) The services of production employees having related duties may be taken advantage of on inspection committees. Stage erectors or repair men may serve as permanent and

continuous staging inspectors, a man or men from the ventilation crew may be utilized for checking on ventilation practices. The reports of state or insurance inspectors will be considered adequate on boilers, air compressors and receivers or on other pressure vessels.

S-6. Employee Safety Training.

6.1 The time for the safety training of an employee to start is at the inception of his employment. After a physical examination, which should be made to make certain that the employee is physically capable of performing safely the work he is requesting, the man shall have explained to him the safety policy of the company by a representative of the safety department. This may be done individually, in general groups or in craft groups and the instruction may be supplemented by printed instructions in the form of rule books or instruction cards.

6.2 Employees shall have in their possession, and be instructed in the proper user of, all necessary personal protective equipment before being started on any job.

6.3 General safety rule books, craft safety rule books or safety instruction cards should be supplied employees. Such books should be concise but complete enough to furnish written record of all important safety rules. *No rule shall be included which will not be strictly enforced.* The assistance of United States Navy-Maritime Commission safety

engineers will be given in the preparation of such rule books if desired.

6.4 All employees shall be instructed in their specific duties by their immediate supervisor and they shall be made familiar with the hazards of the job and instructed carefully in how to avoid them. It shall further be the duty of the supervisor to constantly check all employees so unsafe working practices may be corrected before accidents occer.

6.5 Safety instruction shall be correlated with all apprentice and craft training schools. Safety instruction in such schools or training courses shall include an explanation and demonstration of the need for the safety equipment or safe practices specified and the strict enforcement of all safety requirements in the classes. The instructors shall, by their own example, impress upon the learners the importance of the safety requirements.

6.6 Safety bulletin boards shall be located at each hull and shop, and at such other locations where they may be desirable, on which safety posters, letters or bulletins from the shipyard management or safety department and other safety material may be posted.

6.61 The bulletin boards shall be located where the majority of the employees at a particular location will see them.

6.62 The bulletin boards shall be well constructed, have a locked glass cover and shall be lighted at night.

6.63 Safety posters and other material on bulletin boards shall be changed at least semimonthly or more often. (Posters will be made available by the United States Navy-Maritime Commission for the use of shipyards. However, posters may be selected by the shipyard safety department from any source.)

6.7 Where shipyard house organs (magazines or newspapers) are established, the safety director shall arrange to have a reasonable proportion of the space devoted to safety (articles, items and cartoon cuts relating to safety will be made available by United States Navy-Maritime Commission safety consultants.)

6.8 Sound-film strips and motion pictures on safety subjects should be used where practicable. Public address systems, where installed, may be used for safety messages to shipyard employees especially during lunch hours or at shift changes.

S-7. Safety Supply Store.

7.1 A safety supply store shall be established in each shipyard where shoes, safety hats, protective impact goggles and filter-lens welding goggles shall be made available to shipyard workers. Shoes may be sold at or near cost to employees, but safety hats and impact and filter-lens goggles shall be issued to each employee but shall remain the property of the company to be returned when the employee ends his employment. Equipment such as work clothes,

gloves, welders helmets, may also be stocked and sold to employees if desired.

7.11 Goggles may be stocked in the central tool room or first-aid department but should be fitted as described in paragraph 7.2 following.

7.2 The attendant of the safety shore should be skilled in fitting safety shoes, and if goggles are also issued, he should be trained in proper fitting and servicing of goggles.

S-8. Goggles.

8.1 Impact-resisting goggles of a type suitable for the particular job and also of a type meeting the requirements of the United States Bureau of Standards, shall be worn by every employee exposed to the hazard of eye injuries. Practically every employee in the shipyard, with the exception of those working inside offices at all times are either directly exposed to eye injury from the work they do, or indirectly through working near operations which are likely to produce flying objects. (See paragraph H-10.3a, page 4.)

8.2 Except where *temporary* lack of goggles make it impossible, each employee shall have his own pair of goggles. If it is necessary to reissue goggles to different employees, *the goggles must be sterilized after each use.*

8.3 Goggles supplied employees should be carefully fitted to their face to prevent irritation and to prevent the entrance of foreign objects around the edges. (See paragraph 7.2.)

8.4 All employees working in proximity to arc-welding operations shall be required to wear anti "flash" goggles, of at least No. 2-5 shade (or equivalent), of a type meeting the requirements of the United States Bureau of Standards. (See section 9.1 on welding for additional eye protection for welders.)

8.5 Welding screens constructed of wood, metal or other suitable material shall be used to protect the eyes of workers in proximity to electrical welding operations, whenever their use is practicable.

S-9. Welding-Arc.

9.1 All welders shall be made familiar with the hazards of their work and instructed in safe methods of performing the various types of jobs to which they are assigned.

9.2 Personal protection equipment used by welders shall include:

9.21 Welders' protective hood provided with proper shade of filter type lens for protection against the harmful rays of the arc and a clear cover glass to protect the filter lens.

(a) The shades or their equivalent recommended are:

Up to 30 amperes – No. 6-7 Shade.
30 to 75 amperes – No. 8 Shade.
75 to 200 amperes – No. 10 shade.
200 to 400 amperes – No. 12 Shade.
Over 400 amperes – No. 14 Shade.

(b) Shades may also be selected from the following table:

| Rod Diameter | Welding Glass Shade No. |
|---|---|
| 1/16 | 10 |
| 3/32 | 10 |
| 1/8 | 10 |
| 5/32 | 10 |
| 3/16 | 12 |
| 7/32 | 12 |
| 1/8 | 12 |
| 9/12 | 14 |
| 8/12 | 14 |

(c) The Welders hood should be inspected at least weekly to detect possible light leaks, cracked protective glass, or badly fouled or missing cover glasses. Any defects discovered shall be corrected at once.

9.22 Protective leather welders' jacket, long-sleeved wool shirt with buttoned collar and leather welders' gloves and safety hat.

(a) It has been found satisfactory in the hot summer months to substitute flameproofed cotton shirts. If this is done, the flameproffing, which must be reapplied after each washing, should be done under the direction of the shipyard. This entails that laundering also be done by the company.,

Commercial laundries are rapidly undertaking this type of work.

9.23 Hardened and filter lens protective goggles with sideshields to be worn under the hood for protection against harmful rays where the hood is raised and for protection against flying scale and chips. The goggles should be of a type meeting the requirements of the United States Bureau of Standards and of at least No. 2-4 shade or equivalent.

9.24 Safety shoes or pull-on boots with cord or leather soles and heels.

9.3 Welding screens (constructed of flameproofed fabric on wood or metal frames, metal on metal frames, or plywood sheets joined by rings) of a size sufficient to protect men working nearby from the harmful effects of the electric arc rays shall be used on all electric welding operations when practicable.

9.31 A type found very successful by one large company can be economically constructed of ¼" to 7/8" plywood. Two pieces about 18" x 30" are joined at two points along one edge with 2" x 1/8" rings. The large size of the rings allows the two pieces to lap sufficiently to make a lightproof joint, while the light weight of the assembled screen makes men more prone to use them.

9.4 Welding leads shall be inspected at least once each shift, and those found defective shall be repaired or replaced.

9.5 All Welding leads should be coiled back to centrally located stations after the completion of each shift or job.

9.6 Welding rod tips should not be thrown on decks or stages but should be retained by the welder and turned in at the end of the day for salvage.

9.7 Each electric welder shall make an inspection of the area below him, and of the opposite side of the bulkheads on which he is working, to make certain that there is no danger of falling or penetrating sparks causing a fire. He and his helper must know the location of fire extinguishing equipment and how to use it. It is recommended that a fire extinguisher be available in the immediate area.

9.8 The safety of women welders presents several special problems which should be carefully considered while women are being trained and during their first several weeks on the job.

9.81 Women will at first be subject to excessive fatigue because they are unaccustomed to shipyard work. In their enthusiasm they are likely to overdo and will, under such conditions, be more prone to accidents and at least, absences may follow. They should, until they become accustomed to the work, be carefully watched by

supervisors and if signs of fatigue are evident they should temporarily be given lighter work.

9.82 Work clothing for women is still in the development stage. In general however, the following should be observed:

(a) Safety shoes or pull-on boots with cord or leather soles and heels.

(b) Long underwear, union suit type (wool for winter) khaki trousers and shirt, or coverall type of overall with a drop sest and welders' leather uniform.

(c) It is desirable that the outer clothing, unless of wool, be flameproofed.

(d) Leather gloves.

9.83 Whenever possible, the mechanical means of handling material should be utilized in preferences to manual handling.

S-10. Burners

10.1 Equipment for burners shall be the same as that for welders except that the leather clothing and welders' helmets need not be worn. Filter type lens protective glasses with side shields. No.8-8 shades or their equivalent should be worn. Fameproffed clothing is desirable.

10.2 All individual oxygen and acetylene and other gas lines shall be turned off at the manifold at lunch hour and at quitting time or if the burner must leave the immediate vicinity of his work during the regular shift.

10.3 All hose should be coiled up to the manifold when shifts are changed or when jobs are completed.

10.4 The practice of dusting the clothes by blowing oxygen on them or using oxygen for ventilating or cooling purposes has resulted in several fatalities and *shall be absolutely forbidden.* Oxygen shall be used only in connection with burning or welding operations.

10.5 Each burner shall make an inspection of the area below him, and of the opposite sides of bulkheads on which he is working, to make certain that there is no danger of falling sparking causing a fire. He and his helper should know the location of fire-extinguishing equipment and how to use it. It is recommended that a fire extinguisher be available in the immediate area.

10.6 Burners' uniforms (overalls) shall be laundered at least weekly except that if oil and grease is spilled on the clothing, it shall be changed at once. It is desirable that arrangements be made by the company to have uniforms (overalls) laundered and flameproofed,

10.7 Defective burning equipment such as torch, hose or cylinder pressure regulators (where cylinders are used), shall be repaired immediately.

10.8 All oxygen and acetylene (gas) lines shall be inspected at least once each shift and those found defective shall be repaired or replaced.

10.9 Standard color coding for oxygen and acetylene pipe lines shall be observed for oxygen and acetylene. (Since it may be impossible to secure colored hose during the war, identification may be made by any practicable means so long as every burner and burner's helper or any other person who has occasion to use oxygen-acetylene (gas) equipment is thoroughly familiar with it.)

S–11. Cranes (Whirleys, hammerheads, Bride, etc.)

11.1 The safe loads as specified for cranes on single lift shall not be exceeded.

a. For the guidance of crane operators, weights of all sections over 5 tons shall be plainly marked on the section in figures at least 12 inches high

11.2 On double lifts, cranes shall not be loaded to more than 75% of their combined rated capacities.

11.3 All crane operators shall be given a thorough physical examination upon employment and at at least yearly intervals thereafter. Particular attention should be given to the eye examination.

11.4 Crane inspectors (See section S. 5.14)

11.5 All whirley and hammerhead cranes shall be provided with bumper guards of 3/4" wire rope or equivalent set from 32-36 inches from the ground,

and fastened in the form of a half loop to all four wheel covers at the leading and trailing ends of the crane.

11.6 All traveling cranes regardless of the type shall be equipped with a clearly audible automatically operated signal which will indicate that the crane is in motion. A siren or electric horn pitched to a tons above or below the general noise level of operations is preferable to a gong or bell.

11.7 The Crane operator shall take signals only from the designated hook tenders or riggers and no others. Hook tenders shall be identified by special hats or arm bands.

11.8 All loads shall be lifted or lowered under power.

11.9 Employees shall not be permitted to pass between the leading and trailing trucks of whirley cranes **AT ANY TIME.**

a. Wheel covers shall be provided which will protect all wheels of whirley, gantry, hammerhead and bridge cranes to a distance of ½ inch from the crane tracks.

11.10 Employees shall not remain under, or pass under crane loads.

11.11 Trolley lines for cranes shall be protected against accidental contact by men or material, by wood or other suitable sheathing, or if the trolley lines are elevated they shall have a vertical clearance of at least 12 feet above the ground.

a. Bumper guards for trolley ends of bridge cranes should be provided to prevent the hoisting cables from swinging into the trolley wires.

11.12 The crane operator shall be required to immediately notify a designated department head of any defects he notices in the crane equipment.

11.13 No person other than the crane operator, a trainee, the supervisor in charge of the cranes, the crane inspector, repairmen on crane repair jobs or safety department men shall be permitted in crane cabs. No more than three persons shall be in the cab at any time.

a. Whenever possible, crane operators should be relieved on the ground and not in the crane cab.

11.14 Except under emergency conditions and then only with the approval of the safety department, men shall not ride loads. Men shall never be permitted to ride empty hooks or slings.

11.15 A clearance of at least 2 feet and preferably more shall be maintained between the crane and any stationary object or materials. Where existing structures make this clearance impossible, an exception to this rule may be granted by the United States Navy-Maritime Commission Safety Consultant after an inspection.

11.16 Strong-backs or spreaders should be used on all lifts where there is danger of the load buckling or where the spread is so wide slings or clamps may slip. Steel strong-backs are preferable to wood.

11.17 The hook tenders shall familiarize themselves with the weights of the various plates, shapes and sections handled, so chain or cable slings of the proper size will be used on lifts.

11.18 All chain and cable slings and strongbacks should be clearly marked, by color coding, to indicate the maximum safe load for which they are to be used.

11.19 All electric cranes should be equipped with limit switches to prevent double blocking.

11.20 Storage racks shall be provided for all chain and cable slings at points convenient to the operations so they may be safely stored when not in use. All chain and cable slings shall be inspected before each use by the hook tender if found defective, shall be sent to proper department for repair. Such inspections shall be in addition to, not substitutes for, the regular inspections by the safety department.

S-12. Plant Housekeeping.

12.1 Housekeeping shall be maintained at a high standard in all parts of the shipyard at all times. The following rules shall (or should, as indicated) be put into effect:

a. Wide, well-defined roads, aisles, and passages shall be laid out in the yard and shops and they shall be kept clear of obstructions and shall be kept clean and free from debris. The width of aisles and passages in some of the older yards may be limited because of the existing structures, but an

effort should be made to maintain a width of twice that of the widest hand or power truck, plus two feet.

12.12 Aisles and passages should be defined by white or yellow lines painted on the floors. Materials or machines should not be permitted to encroach on these lines into the aisles.

12.13 All staging platforms, ramps, stairways, walkways, or other walkway surfaces on shipways shall be kept clean of all debris such as welding rod tips, bolts, nuts, and similar material. Welding leads, burner hose and air hose should be elevated over or placed under the walkway surfaces or protected by the cross-over planks. They should be neatly arranged and not left in coils or loops where they may cause men to trip and fall.

12.14 All deck areas on hulls shall be kept free of debris and construction material shall be neatly piled so as not to present a hazard to employees. (See par. S. 12.13 on hose, etc.)

12.15 All deck openings shall, as soon as practicable, be protected with guardrails at least 42 inches in height set 12" back from the edge of the opening. Manholes may be guarded by tacking uprights to the deck and then tacking a ring of the proper

diameter to the top of the uprights. Hatches, without coamings, may be guarded by tacking uprights to the deck at intervals of not more than 10 feet and fastening 2" x 6" or 2" x 8" timber rails in place at 42" from the deck. Midrails set 21" from the deck may be used also, and are especially recommended where women are employed.

(a) Where they are projecting stud bolts around the manholes or tank tops, they should be protected with either metal strips of wood covering to prevent slips and falls or snagging of clothing or wokers.

12.16 All snow and ice shall be cleaned from stagings and platforms (by turning the planks), and from decks, before men on regular production are permitted to work on them.

12.17 Free access shall me maintained at all times to all exists and to all fire-alarm boxes for fire-extinguishing equipment.

12.18 All oils, paints, thinners, solvents, waste, rages, or other flammable substances shall be stored and used strictly in accordance with the requirements of the National Fire Protection Association standards.

12.19 All staging lumber, or other lumber, when dismantled shall have all nails or spikes removed or bent over.

12.20 Plates and shapes shall be stored flat on a substantial timber or concrete foundation that will prevent shifting.

(a) Plates and shapes shall be stored so there is at least an 8-foot clearance from the center line of railroad tracks.

12.21 Angle brackets and similar small pieces shall be stored in racks.

S-13. Lighting

13.1 A level of illumination should be maintained for the various type of jobs in all shops, at least as high as that recommended by the standards of the illuminating Engineering Society.

Minimum standards of illumination for certain industrial interiors as recommended by the Illuminating Engineering Society are as follows:

| *Type of Work* | ***Minimum operations feet-medium measured on the work*** |
|---|---|
| Assembly: | |
| Rough | 10 |
| Medium | 20 |

Construction –Indoor:
General ..... 10
Forge shops and welding ..... 10
Foundries:
Charging floor, tumbling, cleaning, pouring and shaking out ..... 5
Rough molding and core making ..... 10
Fine molding and core making ..... 20
Machine shops:
Rough bench and machine work ..... 10
medium bench and machine work, ordinary automatic machines, rough grinding, medium buffing, and polishing ..... 20
Paint shops:
Dipping, simple spraying, firing ..... 10
Rubbing, ordinary hand painting and finishing art; art, stencil and special spraying ..... 20
Power plants, engine rooms, boilers:
Boilers, coal and ash handling, storage battery rooms ..... 5
Auxillary equipment, oil switches and transformers ..... 10
Engines, generators, blowers compressors ..... 15
Receiving and Shipping ..... 10
Sheet metal works:
Miscellaneous machines, ordinary bench work ..... 15
Punches, presses, shears, stamps welders, spinning, medium bench work ..... 20
Steel and iron manufacturing:
Billet, blooming, sheet bar, skelp and stabbing mills ..... 5

Boiler rooms, powerhouse, foundry and furnace rooms ..... 5
Cold strip, pipe, rail, rod, tube, universal plate and wire drawing ..... 10
Repair shops:
Rough bench and machine work ..... 10
Medium bench and machine work ..... 20
Blacksmith shop ..... 10
Carpenter and pattern shop ..... 20
Storage ..... 2
Store and stock rooms:
Rough bulky material ..... 5
Medium or fine material requiring care ..... 10
Structural steel fabrication ..... 10
Woodworking:
Rough sawing and bench work ..... 10
Sizing, planning, rough sanding, medium machine and bench work gining veneering, cooperage ..... 20

13.2 All lights should be provided with reflectors suitable for the type of work being done and meeting the requirements of wartime time-out regulations. A regular schedule of cleaning and maintenance should be instituted that will keep the lighting unites at their original efficiency.

S-14. Hand Tools

14.1 All tool rooms issuing hand tools such as hammers, sledges, chisels, spud wrenches, center punches, portable air-driven tools, portable electric tools and other tools should be inspected daily by a safety engineer to make certain that only tools in good condition are being issued. Tools in poor condition shall not be issued.

14.2 Workers' personal took kits should be inspected at monthly intervals so defective tools may be discovered and repaired.

S-15. Handling Material (Manual).

15.1 All employees should be instructed in the proper method of lifting. No limit can be set as to the maximum weight to be lifted by one man, but it should be made clear to all employees that they should secure help if the load is too heavy or too bulky for one man to handle easily. Mechanical equipment should always be used when it is available and its use is practicable.

15.11 Posters illustrating the proper method of lifting should be displayed frequently and men observed lifting incorrectly should be reinstructed by their supervisor.

S-16. Machine Guarding.

16.1 All belts, pulleys, gears, chains, sprockets or other dangerous moving parts of the machines shall be completely enclosed with guards constructed of angle-iron brackets covered with heavy sheet metal or ½-inch wire mesh. Vertical or inclined belts shall be guarded to a height of 6 feet above the floor. Horizontal belts over 8 feet above the floor may be guarded only on the under side. Gears, chains and sprockets should be guarded no matter where located.

16.11 Since metal may not be available for guards at present, substantially

constructed wood guards will be acceptable.

16.12 In all cases where state requirements are more stringent than those given above, the state ruling must be followed.

16.2 All machines shall be guarded at the point of operation so employees will not be injured while operating the machine.

16.21 The standards of guarding for the various machines as recommended by the Insurance Rating Bureau should be followed except where state requirements are more stringent when the latter will take precedence.

S-17. Staging and Ladders.

17.1 United States Navy-Maritime Standards of Construction for shipyard staging is in the process of development and will replace the present recommended practice when published.

17.2 All staging, scaffolding, platforms and walkways shall be constructed in accordance with the requirements of the California State Industrial Commission except where existing state codes are more stringent in which case the latter shall take precedence.

17.3 All ladders should conform to the American Standard Safety Code on ladders.

**DEFENDANT'S EXHIBIT C**

The Navy Way: *Full Cooperation*

1943 Letter from Secretary of the Navy to Chief of Bureau of Ships concerning compliance with the Minimum Requirements

"It is requested that action be taken through Supervisors of Shipbuilding to effect full cooperation in this essential program of all private shipyards having Navy contracts."

---

NAVY DEPARTMENT
WASHINGTON (25)

JULY 7, 1943

From: The Secretary of the Navy
To: Chief of Bureau of Ships

Subject: Joint Navy-Maritime Commission project with respect to Safety and Industrial Health in private shipyards having Navy Contracts; - - Failure of certain yards to cooperate.

References: (a) Quarterly Report by Division of Shipyard Labor Relations, U.S. Maritime Commission on U.S. Navy-U.S. Maritime Commission Accident Prevention Program, Janaury 1, 1943 to March 31, 1943.

(b) **"not legible"**

(c) **"not legible"**

Enclosures: (A) Copy of reference (a)

1. Reference (a) indicates that in some cases shipyards in question are not complying with "Minimum Requirements for Safety and Industrial Health in Contract Shipyards", transmitted by reference (b), or are failing to report accidents, or both.

2. It is requested that action be taken through Supervisors of Shipbuilding to effect full cooperation in this essential program of all private shipyards having Navy contracts.

/s/ Forrestal
Acting

cc: U.S. Maritime Commission

7070782

NAVY DEPARTMENT
WASHINGTON (25)

JULY 7, 1943

From: The Secretary of the Navy
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Subject: Joint Navy-Maritime Commission project with respect to Safety and Industrial Health in private shipyards having Navy Contracts; - - Failure of certain yards to cooperate.

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2. It is requested that action be taken through Supervisors of Shipbuilding to effect full cooperation in this essential program of all private shipyards having Navy contracts.

/s/ Forrestal
Acting

cc: U.S. Maritime Commission

7070782

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

Sandra Kay Oney, Executor of the
Estate of SHARON VAUGHN ONEY, Deceased

Plaintiff,

v. CIVIL ACTION NO.: 00301TF

**GARLOCK SEALING TECHNOLOGIES, LLC,**
f/k/a GARLOCK, INC.
SERVE: CT CORPORATION SYSTEM
REGISTERED AGENT
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

**WACO, INC.**
SERVE: DANIEL M. WALKER
REGISTERED AGENT
5450 Lewis Road
Sandston, Virginia 23150

**JOHN CRANE, INC.**
6400 W. Oakton Street
Morton Grove, Illinois 60053
SERVE: Secretary of the Commonwealth
9th Street Office Building
9th and Grace Streets
Richmond, Virginia 23201

**METROPOLITAN LIFE INSURANCE COMPANY**
SERVE: CT CORPORATION SYSTEM
REGISTERED AGENT
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

**FOSTER-WHEELER USA CORPORATION**
Perryville Corporate Park
Clinton, New Jersey 08809-4000
SERVE: CT CORPORATION SYSTEM
REGISTERED AGENT
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

**SB DECKING CO., INC.,**
**a/k/a SELBY BATTERSBY**
c/o Hecker, Brown,
Sherry & Johnson
1700 Two Logan Square
18th and Arch Street
Philadelphia, Pennsylvania 19103
SERVE: Secretary of the Commonwealth
9th Street Office Building
9th and Grace Streets
Richmond, Virginia 23201

**UNION CARBIDE CORPORATION,**
a subsidiary of The Dow Chemical Company
SERVE: CT CORPORATION SYSTEM
REGISTERED AGENT
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

**WARREN PUMPS, INC.**
82 Bridges Ave.
Warren, Massachusetts 01083-0969
SERVE: Secretary of the Commonwealth
9th Street Office Building
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Richmond, Virginia 23201

**GOULDS PUMPS, INC.**
SERVE: CT CORPORATION SYSTEM
REGISTERED AGENT
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**BUFFALO PUMPS, INC.**
874 Oliver Street
North Tawanda NY 14120-3298
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9th Street Office Building
9th and Grace Streets
Richmond, Virginia 23201

**CRANE COMPANY**
SERVE: CT CORPORATION SYSTEM
REGISTERED AGENT
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

Defendants.

AMENDED ABBREVIATED COMPLAINT

Plaintiff hereby adopts and incorporates Plaintiffs Twenty-Second Amended Master Motion for Judgment in Re: All Asbestos Cases filed under the miscellaneous General Asbestos At Law Nos. CL92-10000W-01 and CL92-10000C-03.

1. The Decedent is:

| | |
|---|---|
| **Name:** | **SHARON VAUGHAN ONEY** |
| **SSN:** | **402-58-5821** |
| **Date of Birth:** | **JANUARY 12, 1941** |
| **Date of Death:** | **NOVEMBER 17, 2006** |

2. The Defendants are those Companies listen in the caption.

3. Mr. Oney was employed at Newport News Shipbuilding & Dry Dock Company from July, 1962 to approximately February, 1963 in the Main Machine Shop and from February, 1963 to February, 1994 as an outside machinist and supervisor.

4. Sandra Kay Oney is the Executor of the Estate of SHARON VAUGHN ONEY, Deceased having been duly qualified by the York County – Poquoson Circuit Court, Virginia on December 7, 2006

5. Initial diagnosis of mesothelioma was made on February 3, 2006.

6. Plaintiff demands a trial by jury.

Respectfully Submitted,

PATTON, WORNOM, HATTEN
& DIAMONSTEIN, L.C.

By _____/s/_____
Of Counsel

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Crown Centre Bldg., Ste. 600
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Norfolk, Virginia 23510

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

SHARON VAUGHAN ONEY

Plaintiff,

v. CIVIL ACTION NO.: 00301TF

GARLOCK SEALING TECHNOLOGIES, LLC,
f/k/a GARLOCK, INC.
SERVE: CT CORPORATION SYSTEM
REGISTERED AGENT
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

WACO, INC.

JOHN CRANE, INC.
6400 W. Oakton Street
Morton Grove, Illinois 60053
SERVE: Secretary of the Commonwealth
9th Street Office Building
9th and Grace Streets
Richmond, Virginia 23201

DANA CORPORATION, individually, through its
Victor Products Division and
as a successor in liability to Smith Kanzler
SERVE: ALLEN C. GOOLSBY, III
REGISTERED AGENT
951 East Byrd Street
Richmond, Virginia 23219

METROPOLITAN LIFE INSURANCE COMPANY
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Richmond, Virginia 23201

CRANE COMPANY
SERVE: CT CORPORATION SYSTEM
REGISTERED AGENT
4701 Cox Road, Suite 301
Glen Allen, Virginia 23060

Defendants.

ABBREVIATED COMPLAINT

Plaintiff hereby adopts and incorporates Plaintiffs Twenty-First Amended Master Motion for Judgment in Re: All Asbestos Cases filed under the miscellaneous General Asbestos At Law Nos. CL92-10000W-01 and CL92-10000C-03.

1. The Plaintiff is:

| | |
|---|---|
| **Name:** | **SHARON VAUGHAN ONEY** |
| **SSN:** | **402-58-5821** |
| **Date of Birth:** | **JANUARY 12, 1941** |

2. The Defendants are those Companies listen in the caption.

3. Mr. Oney was employed at Newport News Shipbuilding & Dry Dock Company from July, 1962 to approximately February, 1963 in the Main Machine Shop and from February, 1963 to February, 1994 as an outside machinist and supervisor.

4. Initial diagnosis of mesothelioma was made on February 3, 2006.

5. Plaintiff demands a trial by jury.

Respectfully Submitted,

PATTON, WORNOM, HATTEN
& DIAMONSTEIN, L.C.

By /s/
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(2)

No. 07-1073

FILED
MAR 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

# In The Supreme Court of the United States

**JOHN CRANE INC.,**

***Petitioner,***

**v.**

**SANDRA KAY ONEY,**
**Executor of the Estate of**
**SHARON VAUGHN ONEY, Deceased,**

***Respondent.***

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA**

## BRIEF IN OPPOSITION

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## NATURE OF THE CASE AND MATERIAL PROCEEDINGS

John Crane asks this Court to render an advisory opinion curing John Crane's failure to follow basic procedural and evidentiary rules by dramatically changing settled maritime joint and several liability and apportionment law. The change John Crane advocates would allow it obtain an allocation of fault against a wishlist of "potentially responsible entities" without bringing those entities before the court, without proving those entities were negligent, and without offering any evidence that the entities' products contributed to the Plaintiff's disease. John Crane also summarily asks this Court to revisit for the fourth time its maritime jurisdiction decision in *Executive Jet Aviation, Inc. v City of Cleveland*, 409 U.S. 249 (1972). *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). This Court should deny John Crane's petition on both issues.

In 2004, Sharon Vaughn Oney began experiencing shortness of breath, chest pain, and pleural effusion, the clinical symptoms of mesothelioma. After major surgery in January 2006, he received a pathological diagnosis of malignant mesothelioma, the "signal" cancer of asbestos exposure. From 1962 to 1972, Oney had worked on ships under construction and repair on the navigable waters of the James River at Newport News Shipyard (NNS) as a machinist, work that included routine and daily cutting, scraping, grinding and

hammering asbestos gaskets and packing. During the next ten years he supervised the same work. On February 21, 2006, he filed a Complaint alleging maritime claims for negligent failure to warn, breach of implied warranty, strict liability as restated in § 402A of the Restatement (Second) of Torts, and conspiracy against John Crane, Inc. and others. The Complaint requested compensatory damages of $10,000,000 and punitive damages of $5,000,000.

After suffering intractable pain for two years, Vaughn Oney died from mesothelioma on November 17, 2006. *John Crane's Petition*, Appendix, at 67a. His widow, Sandra Kay Oney, amended and revived the action as a wrongful death case in December 2006. *Id.* at 375a-379a. The jury trial commenced on March 26, 2007 against John Crane, the sole remaining defendant.

The case was tried under general maritime law. At the end of John Crane's case in chief, Plaintiff moved to "strike the defendant's evidence as to comparative fault of the plaintiff and also as to comparative fault as to any defendant except Garlock." *See John Crane's Petition*, Appendix, at 50a – 58a. The Plaintiff had settled with Garlock Sealing Technologies and she conceded that she, herself, had offered sufficient evidence to allow a setoff allocation against Garlock under *McDermott*. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994) (allowing proportionate share allocation for setoff purposes). She contended, however, that there was insufficient evidence to permit allocation of damages against any other manufacturer or against Vaughn Oney. The trial court found no evidence had been

presented of Vaughn Oney's negligence. *John Crane's Petition*, Appendix, at 53a. The trial court also agreed that there was insufficient evidence implicating any entities other than John Crane and Garlock in Oney's death. *Id.* at 57a. Finally, the trial court upheld its pretrial ruling that maritime law did not allow apportionment against bankrupt entities against whom no claims had been made. *Id.* at 57a–58a. Thus the trial court struck John Crane's affirmative defenses of comparative fault as to Oney and as to any entity except Garlock Sealing Technologies, LLC.

John Crane requested that damages be apportioned between itself and Garlock. The jury awarded the Plaintiff $9,251,392.06 in compensatory damages and apportioned 60% of the damages to John Crane and 40% of the damages to Garlock, and it awarded interest at the legal rate beginning on July 11, 2007. As a result, John Crane is liable only for its own 60% share of the total verdict — $5,550,835 plus interest and costs. *See John Crane's Petition*, Appendix, at 2a-4a.

John Crane appealed the verdict to the Virginia Supreme Court contending, *inter alia*, that the trial court erred by trying the case under maritime law. John Crane also complained that the trial court unfairly denied its request to allocate damages against entities that were never parties to the case, that never settled with the Plaintiff, and against which insufficient evidence was presented. The Virginia Supreme Court denied John Crane's Petition for Appeal, and John Crane now asks this Court for a writ of certiorari.

## STATEMENT OF FACTS

Vaughn Oney began his employment at the Newport News Shipbuilding and Dry Dock Company (NNS) in 1962. *John Crane's Petition*, Appendix, at 111a. He testified he routinely and daily cut, scraped, grinded and hammered asbestos-containing marine gaskets and packing materials manufactured by John Crane until approximately 1972 when he became a supervisor. *Id.* at 120a, 124a-130a, 148a-153a. From 1972 to approximately 1980, he continued to be exposed to John Crane's products as he supervised the same type of work. *Id.* at 114a. Mr. Oney also identified Garlock, Flexitallic and Johns Manville as manufacturers of products he used at NNS. *Id.* at 120a, 124a-130a, 148a-153a. In response to questioning from John Crane's counsel, Mr. Oney stated that of the different brands, he used John Crane the most and Johns-Manville the least. *See id.* at 148a-150a. Mr. Oney's coworkers also identified John Crane, Garlock, Johns-Manville, and Flexitallic products. *See, e.g., id.* at 64a, 81a-101a.

The Plaintiff's materials expert, Dr. William Longo, testified that he bulk sampled John Crane's and Garlock's products and that they contained from 50% to 70% asbestos. *Testimony of William Longo*, Apr. 2, 2007, Appendix, at 8a-9a. He also testified that he tested John Crane's and Garlock's products to determine if they released respirable asbestos fibers. His tests demonstrated that these manufacturers' products released from 1.5 fibers per cubic centimeter (f/cc) to 24 f/cc of unbound asbestos fibers – levels 3,000 to 7,000 times the background of his testing chamber, 750,000 to 1,000,000 times the

levels of asbestos in outdoor ambient air in the United States, and far above OSHA's current permissible exposure limit (PEL). *Id.* at 3a-6a, 11a-20a. Fiber Release testing by Dr. Millette (another materials scientist), the NNS, and the Naval Shipyard at Bremerton, Washington corroborated Longo's results.[1] *Id.* at 7a, 9a-10a, 13a, 20a-23a. Mr. Oney's coworkers viewed videos of Longo's tests and testified that the work methods used during the fiber release testing on John Crane's and Garlock's gaskets and packing were substantially identical to the work methods they used on these products at NNS.

The Plaintiff's medical expert, Dr. John Maddox, is a pathologist at Riverside Hospital in Newport News, Virginia. He has diagnosed over 1,000 cases of mesothelioma. But, though he has some familiarity with various asbestos product types from his medical practice, he is not an expert in industrial hygiene, materials science, or product types. During cross-examination, Dr. Maddox admitted that he was aware that various generic product types such as pipe insulation, cement, cloth and boilers may have been used on the ships on which Mr. Oney worked. But no party offered any evidence showing the manufacturer or supplier of these generic product types, or whether these products actually contained asbestos. Additionally, no party offered any evidence showing that these generic product types, or the Flexitallic and Johns-Manville products, (i) released respirable asbestos fibers, (ii) the number of fibers released, if any, (iii)

---

[1] Dr. Longo's testimony is unchallenged in this appeal.

any other specific evidence of asbestos exposure to Mr. Oney from these products, or (iv) any negligent conduct on the part of an entity responsible for these products.

John Crane quotes Dr. Maddox as testifying that "all products to which Mr. Oney was exposed were 'significant and substantial contributing causes to the development of his malignant mesothelioma.'" *John Crane's Petition*, at 8. Yet John Crane omits a critical caveat. Dr. Maddox stated that "*to the extent he breathed in asbestos fibers* from all of the products that he worked with at the shipyard, all of those exposures were significant and substantial, contributing causes to the development of his malignant mesothelioma." *John Crane's Petition*, Appendix, at 77a-78a (emphasis added); *id.* at 81a (testifying "*as long as those were asbestos-containing gaskets that released fibers that he breathed* . . . they would all contribute" (emphasis added)). Stated differently, Dr. Maddox testified that an exposure was "significant and substantial" only "to the extent" Mr. Oney "breathed in asbestos fibers from" the product. *Id.* at 77a-78a. And, as discussed above, there simply was no evidence from any party that any product other than those manufactured by Garlock and John Crane released respirable asbestos fibers.

## PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

This Court should deny John Crane's petition on both issues asserted. First, this Court should decline to issue an advisory opinion changing settled

law relating to maritime joint and several liability and apportionment to cure John Crane's own failure to follow basic procedural and evidentiary rules. Second, this Court should refrain from revisiting, for the fourth time, the contours of its maritime jurisdiction decision in *Executive Jet Aviation, Inc. v City of Cleveland*, 409 U.S. 249 (1972), in a case that John Crane concedes is jurisdictionally identical to the *John Crane v.Jones* case for which this Court just denied certiorari.

## I. MARITIME LAW AND THE EVIDENCE OFFERED AT TRIAL PERMITTED ALLOCATION OF FAULT ONLY BETWEEN JOHN CRANE AND GARLOCK.

John Crane concedes joint and several liability is the general rule in maritime law. *See John Crane's Petition*, at 7; *see also Norfolk & Western Railway Company v. Ayers*, 538 U.S. 135 (2003) (citing *The Atlas* 93 U.S. 315 (1876)); *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995) (*en banc*); 1 Thomas J. Shoenbaum, ADMIRALTY AND MARITIME LAW § 5-14, at 232 (4th ed. 2004). John Crane claims, however, that *McDermott*, *Reliable Transfer*, and a law review Note written by a third year law student support its argument that this Court should allow it to obtain allocation against a wishlist of "potentially responsible entities" without (1) bringing any of those entities into the case, (2) proving that any of

those entities were negligent, and (3) proving that any of those entities caused the plaintiff's damages.

*McDermott* and *Reliable Transfer* do not support John Crane's argument, they refute it. And the lack of any evidentiary support against any entity other than John Crane and Garlock in this case would mean that an opinion issued by this Court would be purely prospective and advisory.

John Crane wanted the trial court to instruct the jury to apportion damages among the following: (1) two insolvent entities,[2] (2) generic products types like "pipecovering", "cloth", and "cement" for which no evidence was presented by any party regarding the tradename, manufacturer or supplier of the product; and (3) Newport News Shipbuilding and Dry Dock Company (NNS). *See John Crane's Petition*, Appendix, at 24a-30a, 174a-200a. Importantly, none of the identified entities were parties to the lawsuit, no evidence was offered against NNS, and no liability or causation evidence was offered concerning any of products discussed in (1) and (2) above. Additionally, the two insolvent entities, Johns-Manville and Flexitallic, are immune under a bankruptcy stay and a court-approved bankruptcy trust distribution process. And NNS, Mr. Oney's statutory employer under the Longshore

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[2] Flexitallic, now owned by Federal Mogul Corporation through Gasket Holdings Inc., is still protected by the Bankruptcy Code's automatic stay. *See* 11 U.S.C. § 362. Johns Manville went through bankruptcy and now has a court approved bankruptcy trust (the Trust) that is able to pay only 5% of the scheduled liquidated value of $350,000 to beneficiaries.

and Harbor Workers' Compensation Act, is immune to apportionment under this Court's decision in *Edmonds*.

Apportioning damages among these sources would have violated this Court's maritime apportionment decisions and undermined at least two primary tenets of the "well-settled" joint and several liability that John Crane concedes governs this case. First, such an apportionment would have violated the "clear . . . right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election." *Coats*, 61 F.3d at 1125 (quoting *The Atlas*, 93 U.S. at 315). This Court has repeatedly held that maritime joint and several liability permits "an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, *even if the concurrent negligence of others contributed to the incident.*" *Edmonds*, 443 U.S. at 260 (emphasis added); *The Atlas*, 93 U.S. at 315. But under John Crane's approach, the plaintiff would lose this valuable right to determine whom to sue.

The second tenet of joint and several liability requires the wrongdoing tortfeasor to "bear the burden of identifying other responsible parties and *demonstrating* that some of the costs of the injury should be spread to them." *Ayers*, 538 U.S. at 165 (emphasis added). But John Crane's proposal shifts this burden to the plaintiff. In *Ayers*, this Court held that FELA incorporates maritime's "traditional rule" of joint and several liability. *Id.* at 163 (citing *The*

*Atlas*, 93 U.S. at 315 and quoting 42 Cong. Rec. 4536 (1908) (remarks of Sen. Dolliver)). Under maritime joint and several liability principles, it is the wrongdoing tortfeasor, not the innocent plaintiff, who must bear the risk of noncollection. *See Coats*, 61 F.3d at 1116 (noting under maritime joint and several liability, "the risk of noncollection is borne by the defendants"); *see also McDermott*, 511 U.S. at 220-21 ("Joint and several liability . . . can result in one defendant paying more than its apportioned share of liability"); *Edmonds*, 443 U.S. at 273 n.30 ("[A] person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if other factors concurred in causing the injury.").

If the trial court had allowed the allocation sought by John Crane, the Plaintiff would be facing a fragmented judgment against John Crane, insolvent nonparties, an immune employer, and generic product types that may not have contained any asbestos and with no entity from whom to collect. John Crane's damages would be limited, but the risk of noncollection would be placed entirely upon the Plaintiff with no recourse to collect against any of the other allocated amounts.

### A. Maritime Allocation Of Damages For Comparative Fault Under *Reliable Transfer* And Set-Off Under *McDermott* Require Proof Of Fault Against Parties Or Settling Entities.

This Court's decisions permit allocation in maritime actions only in two instances: (1) allocation in the nature of contribution against other comparatively negligent parties at trial pursuant to *Edmonds*, *Reliable Transfer*, and their predecessors (comparative negligence allocation), or (2) setoff for the proportionate fault of settling parties pursuant to *McDermott* (setoff allocation).

Comparative negligence allocation is simply an extension of maritime's longstanding divided damages rule in ship collision cases. *See, e.g.*, *The North Star*, 106 U.S. 17, 20 (1882) ("The rule of admiralty in collision cases, as we understand it, is that, *where both vessels are in fault*, they must bear the damage in equal parts . . . ." (emphasis added)); *Crain Bros., Inc. v. Wieman & Ward Co.*, 223 F.2d 256, 258 (3d Cir. 1955) ("Where two parties *are jointly responsible for injury* to a third, each is primarily liable for only one-half the damages." (emphasis added)). This Court approved the application of comparative negligence allocation in non-collision cases in *Cooper Stevedoring Co. v. Kopke*, 417 U.S. 106, 113 (1974). And it softened the "harshness" of the "equal division of damages" in *Reliable Transfer Co.*, 421 U.S. at 406, by adopting a comparative negligence approach. But throughout its development, comparative negligence allocation

has always been in the nature of a contribution shortcut.[3] *See Edmonds*, 443 U.S. at 271 n.30 (explaining that where the appropriate parties "*are already before the court* . . . a separate contribution action is unnecessary, and damages are simply allocated accordingly." (emphasis added)); *The North Star*, 106 U.S. at 21 ("By the maritime law this is a case of average loss or contribution").

Under the second type of allocation, setoff allocation, this Court's decision in *McDermott* permits factfinders to allocate fault for *setoff* purposes when the plaintiff has settled with a co-defendant. *See McDermott*, 511 U.S. at 202. *McDermott*, however, was careful to distinguish between the setoff allocation it was recognizing there, and the comparative negligence allocation it had long recognized in *Reliable Transfer, Edmonds*, and their predecessors. *See McDermott*, 511 U.S. at 221 ("*Unlike the rule in Edmonds*, the proportionate share rule announced in this opinion applies *when there has been a settlement*." (emphasis added)).

Though this Court attempted to harmonize the allocation schemes under both *McDermott* and *Reliable Transfer/Edmonds* by dubbing the *McDermott* setoff allocation a "proportionate share" allocation, the two types of allocation are conceptually distinct. One is for streamlined

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[3] Where one of the negligent parties was the plaintiff, this rule also ameliorated the harshness of the common law's strict contributory negligence bar by allowing the plaintiff to recover all amounts not apportioned to him. *See, e.g., Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953).

contribution against a nonsettling party; the other is for setoff against a settling party.

Even though they are distinct, apportionment of damages under both comparative negligence allocation and setoff allocation requires proof of fault.[4] With regard to comparative negligence allocation, the first time this Court was asked to review the fairness of the equal division of damages rule, it determined that there was insufficient evidence of fault against the allocation defendant. Accordingly, the Court held "there is no occasion to consider how damages should be apportioned . . . ." *Union Oil Co. v. The San Jacinto*, 409 U.S. 140, 146 (1972); *see also Cooper Stevedoring Co.*, 417 U.S. at 115 ("Contribution rests upon a finding of concurrent fault."); *The North Star*, 106 U.S. at 28 (holding that "it being ascertained that both parties were in fault" apportionment was appropriate).

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[4] Neither has any other jurisdiction the Plaintiff is aware of. John Crane mentions statutory provisions in Texas and Louisiana as models of the allocation it envisions, but even in those jurisdictions the party seeking allocation must prove causation and fault on the part of the allocation defendant. *See*, e.g., Tex. Code Civ. Prac. § 33.003 (requiring the factfinder to determine the percentage of responsibility of various entities, but stating that "[t]his section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission"); *Socorro v. New Orleans*, 579 So. 2d 931, 942 (La. 1991) (noting that under Louisiana's Uniform Comparative Fault Act, "in determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relationship between the conduct and the damages claimed.").

Similarly, the early, pre-*McDermott* proportionate fault setoff decisions of the lower federal courts recognized that a "tortfeasor seeking to assert a reduction by the degree of fault of alleged joint tortfeasors must prove by a preponderance of the evidence that the settling defendant was, in fact, at fault." *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1248 (5th Cir. 1979); *see also Bordelon v. Consolidated Georex Geophysics*, 628 F. Supp. 810, 812 (W.D. La. 1986) ("The plaintiff does not have the burden of proof on this issue. It is the non-settling alleged joint tort-feasor who must come forth and prove that the settling alleged joint tort-feasor was at fault and that this fault caused the injuries sustained by the plaintiff.").

John Crane has argued in the trial court and here that, in the wake of *McDermott*, if a defendant merely identifies a "potentially responsible entity" (or even a suspect generic product) — without anything more — it may obtain both comparative negligence allocation against nonsettling entities, and setoff allocation against settling entities. Nothing in *McDermott* supports this contention. To the contrary, this Court reiterated the settled proposition that "the relative fault of the parties will have to be determined" and that under "the proportionate share approach, the allocation will take place at trial." *McDermott*, 511 U.S. at 216-17. As Professor Schoenbaum noted ten years after *McDermott*, "the non-settling defendant at trial must present evidence of the settling defendant's liability just as it would if presenting a claim for contribution." 1 Shoenbaum, ADMIRALTY AND MARITIME LAW § 5-19, at 256.

This stands to reason. Without evidence of fault against the proposed allocation defendant, a factfinder has no basis on which to make a relative allocation of damages. Moreover, setoff is an affirmative defense and the defendant asserting this affirmative defense has the burden of proving it. *See, e.g., Davis v. Odeco, Inc.*, 18 F.3d 1237, 1246 (5th Cir. 1994) (noting that setoff is an affirmative defense under maritime law); *see also Dobson v. Camden*, 705 F.2d 759, 770 (5th Cir. 1983) (stating "the party desiring a reduction in judgment on account of a settlement has the burden of proving its entitlement to that reduction by showing another party shares responsibility for the injuries and submitting jury issues on relative fault/causation."); Restatement (Third) of Torts; Apportionment of Liability, § 16, comments c, f (1998) (stating that "*the defendant has the burden of proof* that the settling tortfeasor's tortious conduct was a legal cause of plaintiff's injury, that there was a settlement, that the settlement was for the injuries for which the plaintiff is suing, and that defendant would

otherwise have a valid contribution claim against the settling tortfeasor." (emphasis added)).[5]

Finally, the underlying rule of joint and several liability has always applied to comparative negligence allocation and *McDermott* reaffirmed it for setoff allocation as well. Thus "[w]here two parties are jointly responsible for injury to a third, each is primarily liable for only one-half the damages . . . with a provision that if the libellant cannot collect any part from one, that amount should be assessed against the other in addition to the one-half for which it is primarily liable." *Crain Bros., Inc.*, 223 F.2d at 258.

In short, John Crane concedes that joint and several liability governs maritime law, and the only two caveats to joint and several liability — apportionment for comparative negligence and apportionment for setoff — required John Crane to prove the contributing fault of any additional nonsettling parties, or any settling co-defendants.

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[5] Though *McDermott* noted that under its setoff rule there would be no separate contribution actions among the defendants, this should not be construed to be a disapproval of maritime contribution actions in general. Rather it was a recognition that since the necessary parties would already be before the court and their proportionate liabilities could be established during the original action, additional contribution actions for setoff were not necessary and ought not be allowed. Outside the setoff context, maritime contribution actions are still available against non-settling entities that were not parties to the original action. Thus, even now, if John Crane had a good faith belief that another non-party company's products contributed to Mr. Oney's death, it should be able to seek contribution against that company in a separate action under maritime law.

### B. The Trial Court Correctly Understood Maritime's Joint And Several Liability And Apportionment Law And Prohibited Additional Allocation Because John Crane Failed To Shoulder Its Burden of Proof.

The trial court understood and properly applied maritime's unambiguous joint and several liability and apportionment law. It precluded apportionment against entities other than Garlock — not because it thought maritime law precluded apportionment — but because there was insufficient evidence to support an allocation of fault for setoff or comparative negligence against any entity other than Garlock.

John Crane offered no evidence relating to any duty or any breach of duty by Johns-Manville, Flexitallic or any other entity. And, there is no evidence anywhere in the record establishing a causal link between any Johns-Manville product, any Flexitallic product, or any other product and Mr. Oney's mesothelioma. At page 27 of its Petition, John Crane gives a string citation of transcript pages that it claims "proved Johns-Manville and Flexitallic's unquestionable and substantial contribution to the cause of Mr. Oney's disease." But those citations merely refer to Mr. Oney's or his co-workers' identification of Johns-Manville or Flexitallic products, and Dr. Maddox's testimony that *if a product released respirable asbestos fibers that were inhaled by a plaintiff*, those fibers would be a contributing factor in the plaintiff's disease. As

discussed above, however, there is no independent evidence in the record establishing that those products, or any other manufacturer's product, (1) contained asbestos or, if so, how much asbestos it contained, (2) whether any asbestos fibers were released when the product was handled, (3) whether any fibers that may have been released were encapsulated in binders, (4) whether any uncoated fibers that were released would have been respirable, (5) the regularity and frequency with which any such product was used around Mr. Oney, or (6) any other specific evidence of exposure. John Crane raised each of these points before the jury in its primary defense against the Plaintiff's claims. And the Plaintiff established all of these points with regard to John Crane's and Garlock's products through her materials expert, Dr. Longo. This is why the Plaintiff, in fairness, did not object to the allocation against Garlock. But John Crane offered no proof of any of these matters against any other manufacturer's product.

Because of this utter lack of evidence against any other entity, the Plaintiff moved to strike John Crane's comparative negligence and setoff claims against any entity other than Garlock. *See John Crane's Petition*, Appendix, at 51a-58a. And during argument against the Plaintiff's motion, John Crane was unable to cite any specific evidence against any other entity. To be sure, John Crane was unable to so much as identify any entity other than Johns-Manville, Flexitallic, and Garlock and, instead, asked the trial court to create a completely new type of nonbinding allocation against generic product

types like pipecovering and cloth.[6] *See John Crane's Petition,* Appendix, at 28a-30a, 54a. The trial court declined the offer and granted the Plaintiff's motion to strike John Crane's comparative negligence and setoff claims against any manufacturer but Garlock. *See id.* at 58a. John Crane never appealed the trial court's decision to strike those claims, and that decision is now the law of the case.

### C. John Crane's Request To Apportion Damages Against Johns-Manville And Flexitallic Would Have Required The Trial Court To Violate A Bankruptcy Stay And The Clear Terms Of A Court-Approved Bankruptcy Trust Distribution Process.

Relying on *McDermott's* treatment of AmClyde as an "immune" but apportionable entity, John Crane contends that *McDermott* now permits allocation against all immune entities. *See John Crane's Petition*, at 28-29. But this is not true. In *McDermott*, the source of AmClyde's immunity was a preexisting contract "with McDermott," the plaintiff,

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[6] John Crane now seems to have abandoned its argument that allocation may be made against generic product types for which no manufacturer is identified. John Crane also appears to have abandoned its argument that a court might apportion fault against Mr. Oney's statutory employer, the Newport News Shipbuilding and Dry Dock Company. *Cf., Edmonds,* 443 U.S. at 268-70; *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); 1 Shoenbaum, ADMIRALTY AND MARITIME LAW § 5-18 (3), at 252 (noting "there is no right of contribution against a joint tortfeasor who is immune from a suit brought by the injured party").

that "provided that free replacement of defective parts 'shall constitute fulfillment of all liabilities . . . whether based upon Contract, tort, strict liability or otherwise.'" *McDermott*, 511 U.S. at 210 n. 10. This Court specifically noted that no party had appealed the circuit court's decision finding AmClyde immune to suit under the contract, and that the plaintiff had not asked that AmClyde's share be absorbed by the other nonsettling defendant, River Don. This Court decided that the best way to view AmClyde's contract was as a preexisting, "quasi-settlement" entered into by the plaintiff prior to litigation. This is a far cry from the issues in this case.

Here, both Flexitallic and Johns-Manville are bankrupt. Flexitallic, now owned by Federal Mogul Corporation through Gasket Holdings Inc., is still statutorily immune under the Bankruptcy Code's automatic stay provisions. *See* 11 U.S.C. § 362. Thus even if the Plaintiff thought she had a good faith claim against Flexitallic in this case, she could not have brought Flexitallic before the court. John Crane — who apparently had no evidence against Flexitallic either — was, likewise, unable to obtain an apportionment against this judgment-proof entity.

Johns Manville went through bankruptcy and its bankruptcy Trust is administered under a court-approved bankruptcy trust distribution process (TDP). *See 2002 Manville Personal Injury Trust Distribution Process*, *available at* http://www.mantrust.org/FTP/C&DTDP.pdf (accessed March 12, 2008) (hereinafter the "TDP Document"). "[P]laintiffs and defendants . . . are

required to pursue their claims against the Trust *only* as provided in this TDP." *Id.* at 18, ¶ I. (emphasis added). The TDP contains clear procedures for obtaining setoff in proportionate share jurisdictions, which John Crane chose not to follow. *See id.* at 22, 25, ¶¶ I.3(d)(ii)(B) & I.4.

The Plaintiff never filed a claim against the Trust and she informed the court of this fact during both the pretrial hearing and during her motion to strike John Crane's comparative fault evidence.[7] *John Crane's Petition*, Appendix, at 55a, 155a-159a. The Plaintiff was well within her joint and several liability rights to forego making this claim, and if John Crane thought Johns-Manville was partly to blame for Mr. Oney's death, it should have followed the rules set forth in the TDP.

John Crane never filed a third party claim against the Trust. *See TDP Document*, at 19, ¶ I.1.(c). Accordingly, the Trust was never before the Court, was not a party to this action, and was not subject to apportionment under either maritime law or the court-approved bankruptcy TDP. Moreover, even if John Crane had filed a third-party claim against the Trust, it bore the burden of proving Johns-Manville's liability and the proportionate share of damages caused by its products. And, as discussed earlier, no evidence was offered against Johns-Manville on either of these elements. Nevertheless, now that John Crane is liable for a judgment, it may make a contribution claim directly

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[7] Because the Plaintiff never filed a claim against the Trust, she is not a "Trust beneficiary" under the TDP.

against the Johns-Manville Personal Injury Trust under the TDP — assuming it can demonstrate that the Trust is liable — but John Crane has apparently chosen not to pursue such a claim.[8]

In summary, the trial court was apprised of the status of both of these entities. It understood the effect of the bankruptcy stay, the TDP, and maritime joint and several liability. And it correctly declined to allow the jury to allocate damages against these bankrupt entities.

### D. John Crane Seeks an Advisory Opinion Regarding Allocation Against Any Entities That Have Never Been A Party To The Action.

Finally, John Crane argues that this Court should cure John Crane's failure to follow basic procedural rules by changing maritime law to give the "jury the ability to apportion fault to all potentially responsible entities . . . ." *John Crane's Petition*, at 35. But this argument ignores two simple facts: (1) John Crane already has that ability, and (2) John Crane chose not to exercise it. John Crane had the ability to obtain good faith apportionment against other responsible entities by bringing those entities before the court and proving

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[8] Though the Trust was originally scheduled to pay $350,000 per mesothelioma claim, through no fault of the Plaintiff, the Trust was grossly underfunded and currently pays "asbestos health plaintiffs" only 7.5% of the scheduled amount. John Crane's failure to pursue a claim against the Trust may be due to the fact that it would likewise be limited to recovering the same 7.5% of the scheduled amount.

their causal role and percentage of fault. Whether John Crane's failure to exercise this option was a tactical decision or simple negligence, John Crane had the ability to bring (or keep) "potentially responsible entities" before the court, but chose not to.

John Crane complains that the current regime is unfair because it gives plaintiffs complete control over what entities are before the court. While the initial decision of whom to sue or whether to nonsuit a party is under a plaintiff's control, that control is limited. If John Crane had a good faith claim against a manufacturer who was not a party to the case, John Crane could have filed a third-party claim. *See* Va. S. Ct. Rule 3:13. Likewise, if John Crane believed in good faith that the Plaintiff's damages were attributable to the negligence of a co-defendant, it could have filed a cross-claim and that cross-claim would have prevented the Plaintiff from nonsuiting that party without John Crane's consent. *See* Va. S. Ct. Rule 3:10; Va. Code Ann. § 8.01-380 (D).

John Crane also complains, without any support, that the Plaintiff was somehow dilatory in providing settlement information and that this prejudiced John Crane's ability to prove an allocation case against its co-defendants. As an initial matter, John Crane has yet to identify to any court a single nonsuited party against which it was prevented from achieving allocation. But more to the point, whether and when the Plaintiff settled with any of John Crane's co-defendants is immaterial for this issue. From the time Mr. Oney

filed his initial complaint over one year before trial, John Crane knew the identity of its co-defendants. Nothing prevented John Crane from filing cross-claims against one or more of those co-defendants and, as stated earlier, filing a cross-claim would have prevented a nonsuit without John Crane's consent. Additionally, nothing prevented John Crane from preparing an allocation case against those co-defendants. Indeed, whether or not the Plaintiff settled with any co-defendant, John Crane still would have had to present evidence establishing the relative fault of that defendant — either for setoff purposes if there was a settlement or for comparative negligence if there was no settlement. Thus John Crane's settlement-notification complaint is a red herring.[9]

John Crane also seems to contend that *McDermott* obviated the requirement that nonsettling parties be before the court before a comparative negligence allocation may be made. But *McDermott* is a setoff case; it reiterated no less than three times that its opinion was limited to determining the proper approach for determining the setoff shares of settling parties. *See McDermott*, 511 U.S. at 207 (the issue on review is "how a settlement with less than all of the *defendants* in an admiralty case should affect the liability of nonsettling defendants" (emphasis added)); *id.* at

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[9] Moreover, John Crane has been involved in this litigation for almost thirty years. It is well acquainted with the other potential defendants in these matters. And it knows which defendants characteristically settle, and which defendants pursue the type of scorched-earth, no-settlement policy that John Crane pursues.

220 ("*Edmonds* did not address the issue in this case, the effect of a settlement on nonsettling parties. Indeed, there was no settlement in that case. Instead, one can read that opinion as merely reaffirming the well-established principle of joint and several liability."); *id* at 221 ("Unlike the rule in *Edmonds*, the proportionate share rule announced in this opinion applies when there has been a settlement."). *McDermott* also repeatedly reaffirmed joint and several liability — including the clear "'right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.'" *Edmonds*, 443 U.S. at 260 (quoting *The Atlas*, 93 U.S. at 315). Thus whatever *McDermott* says about the presence of parties before the court should be limited to matters involving setoff credit for settling parties.

But even in the proper setoff context, nothing in *McDermott* says that an entity need not be a party to the action before an allocation is proper.[10] Indeed, the opinion assumes that such would be the case. The very issue considered by the Court was "how a settlement with less than all of the *defendants* in an admiralty case should affect the liability of nonsettling defendants." *McDermott*, 511 U.S. at 207 (emphasis added). And the facts of the case and entire context of the opinion related to

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[10] John Crane also cites *Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316 (3d Cir. 2003), and *Sigler v. Grace Off-Shore Company*, 663 So. 2d 121 (La. App. 1995). But compare *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716, 722 (11th Cir. 1982), *cert. denied*, 460 U.S. 1038 (1983) (finding "it was error for the trial court to distract the juror's attention by requiring it to allocate the degree of fault between the defendant and *a non-party*."); *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908, 917 (2d Cir. 1987) (finding it was error for the trial court to submit to the jury special interrogatories to determine the comparative degrees of fault between a defendant and a *non-party*."). Moreover, *Calhoun* discussed this matter only in *dicta* because the jury rendered a defense verdict. *Calhoun*, 350 F.3d at 325. And in that *dicta*, *Calhoun* relied on *Sigler* and *Sigler* went against John Crane's argument. There, the plaintiff sued three entities, Kilgore Offshore Crewboats, Inc., Grace Offshore Company, and CNA Insurance Company. *Sigler*, 663 So. 2d at 213. The Plaintiff later voluntarily dismissed Grace and CNA. *Id.* at 214. Kilgore, the remaining defendant, sought to bring Grace back in as a third party defendant under a contribution and indemnity claim, but the Court held that it could not because the plaintiff's voluntary dismissal of Grace somehow bound Kilgore as a third-party plaintiff. *Id.* at 214, 215. Nothing in maritime law sanctions that decision, and it certainly does not support John Crane's argument here because it would have precluded John Crane from filing a third-party claim to obtain an allocation.

apportionment among entities that were parties to the action.[11]

Ultimately, however, none of this matters because John Crane not only failed to bring any "potentially responsible entity" before the court, it could not even identify an additional potentially responsible entity other than Flexitallic and Johns-Manville, the two insolvent companies discussed above. As the trial judge observed, "Now, there was never a manufacturer identified — assuming we ever got to that point, there was never a manufacturer identified of that product to vacate the defendant in this case." *John Crane's Petition*, Appendix, at 57a (argument on Plaintiff's motion to strike at the conclusion of John Crane's case-in-chief).

What John Crane really wants is to be able to obtain apportionment against any entity it can think of without the inconvenience of bringing that entity before the court and proving an apportionment case against it. But, even if this Court were inclined to make such a sweeping change, the Court would have to issue an advisory opinion on a factual record that is devoid — not only of evidence against responsible entities — but even of the mere identification of any "potentially responsible entity" other than John Crane and Garlock (against whom allocation was made) and Flexitallic and Johns-Manville (against whom allocation is prohibited). Thus to decide this issue in this case, the Court would be issuing a

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[11] Even AmClyde, which was later determined to be contractually immune on appeal, was a party to the action.

purely advisory opinion. This Court should deny John Crane's petition.

## II. THE TRIAL COURT CORRECTLY APPLIED THE CONTROLLING PRECEDENT AND PROPERLY HELD THAT MARITIME LAW APPLIED TO THIS CASE.

John Crane once again claims that the Virginia Supreme Court erred in construing the *Sisson nexus* test in *Garlock Sealing Technologies, LLC v. Little*, 620 S.E.2d 773 (Va. 2005), and *John Crane v. Jones*, 650 S.E.2d 851 (Va. 2007), *cert. denied*, 552 U.S. ___, 2008 U.S. LEXIS 1326 (Feb. 19, 2008), and that the trial court, likewise, erred in this case by following this precedent. John Crane states that "the facts and arguments" it raised in its petition for writ of certiorari in *Jones* "are substantially similar for purposes of determining whether application of general maritime law is appropriate" in this case. The Plaintiff agrees that the cases are jurisdictionally identical — Garland Jones and Vaughn Oney were both machinists at Newport News Shipbuilding and Dry Dock Company; they both worked regularly with Garlock and John Crane gasket and packing products on ships on the navigable waters of the James River; and they both contracted mesothelioma as a result of this work after a typical 40 to 50 year latency period. Accordingly, like John Crane, the Plaintiff relies on the arguments presented in her Brief in Opposition to Petition for Writ of Certiorari in *John Crane v. Jones*. For the reasons stated in that Opposition,

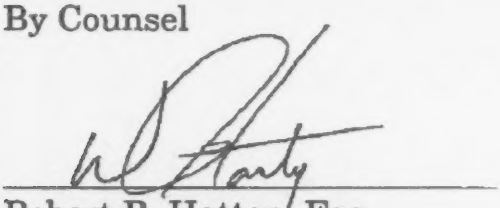
this Court should deny John Crane's petition on this issue.

## CONCLUSION

For the foregoing reasons, the Plaintiff requests that this Court deny John Crane's Petition on both questions presented.

Respectfully Submitted,
SANDRA KAY ONEY, Executor of the Estate of SHARON VAUGHN ONEY, deceased

By Counsel



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# APPENDIX

ENTERED April 2, 2007

VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

| | | |
|---|---|---|
| SANDRA KAY ONEY, Executor Of the Estate of SHARON VAUGHN ONEY, Deceased, Plaintiff, | ) | AT LAW NO. 00301TF |
| v. | ) | |
| JOHN CRANE, INC., Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
DAY 6
April 2, 2007

BEFORE:
THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

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| | DIRECT | CROSS | ReD | ReX |
|---|---|---|---|---|
| Kenneth M. Bond, Sr. | 1180/1236 | 1213 | 1231 | 1235 |
| William E. Longo, PhD | 1240 | 1348 | 1394 | -- |


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Q. Did you do a background analysis so that you could compare what the level was in your lab with what you actually found in the test?

A. Yes, sir, we did.

Q. And without the Tyndall lighting could you see the asbestos -- or could you see dust?

A. No, you could not.

Q. What was the background in your lab chamber that you measured when you began your test?

A. The background ranged from 0.0002 to 0.0007.

Q. So, did you determine or reach a conclusion as to whether or not the product had the capacity to release fibers over background levels?

A. Yes, sir.

Q. And what was that conclusion?
A. That it did.
Q. And by approximately how many – what's the relationship between the background and the fiber release as you determined it in terms of multiples?
A. Approximately a hundred times over background.
Q. Okay. Now, did you also do -- and I'm going to get to the videos in a minute, but rather than do all these separately, did you also do a test of gasket material to determine whether or not the foreseeable use of gasket material, the John Crane 2150, had the potential to release asbestos fibers?
A. Yes, sir, during the fabrication, using a ball-peen hammer.
Q. All right. And when was that test done?
A. I believe that test was done in 2006.
Q. Okay. And can you tell the ladies and gentlemen of the jury how you structured that test and what you determined?
A. Well, again, inside our room we took a flange and took about one-foot square sheets of John Crane 2150 gasket and with a ball-peen hammer tapped out the design of the gasket itself using the flange

as a template. So you lay it over the flange, and

then I guess the semi-sharp edges of the flange will cut through the gasket when you tap it with a ball-peen hammer. And this was a technique that has been described by a lot of different folks who used to work with gaskets, so we wanted to do two things; measure the potential release of asbestos while fabricating these gaskets with a ball-peen hammer, and then, secondly, after fabrication, see what the release was if individuals actually took a file and smoothed up the inside surfaces of the gasket. So it was really two studies in one.

Q. All right. What did you determine was the potential for asbestos fiber release from making a gasket with a ball-peen hammer on a flange?

A. Without doing any filing, just making the gasket, the fiber release levels were around 1.4 or 1.5 fibers per cc, on average, as I recall.

Q. 1.4 fiber per cc, on average. And when you used the file did that number change?

A. It increased it, which was to be expected.

Q. Do you know what the increase was?
A. I'd have to look at my results. Sorry.
Q. Okay,

A. I think it's around 2.0, 2.5, but I'd just rather check to be sure.
Q. Okay.

(There was a pause in the proceedings.)

THE WITNESS: Approximately three fibers per cc.

BY MR. HATTEN:
Q. All right. On -- I think you -- how many fibers did you say would be released in a year if you worked at a one-fiber level for a whole year?
A. I don't know how many would be released, but --
Q. I mean breathed.
A. But if somebody inhaled one fiber per cc for a working year it's approximately a billion.
Q. Okay. All right.
Now, this test, though, was not intended to measure what any individual's exposure could be.
Is that correct?
A. No, sir, it was for the potential.
Certainly it's very feasible that individuals who used to do this work had exposures of this magnitude fabricating gaskets; they may have higher, they may have lower. But this study showed the potential, so

we know that there's the potential for exposure if you

do this type of work activity.

Q. Okay. Now, did you -- was anyone else asked to check your test results and determine whether or not they were scientifically capable of being duplicated?

A. Yes.

Q. Who was that?

A. Dr. Jim Millette from MBA.

Q. All right. And what is that? What is MBA?

A. He's actually, I guess, a competitor of mine and has a laboratory about 30 miles away from mine.

Q. All right. To your knowledge, did he do the same test and try to -- the same methodology?

A. Yes, sir, that's my understanding.

Q. All right. Now, let me ask you, on this gasket material what did you find was the -- or did you find that there was any tremolite contamination in that gasket?

A. Yes, sir. We performed the more sensitive tremolite test, and the concentration was 0.025 weight percent.

Q. Did you determine whether or not this making of gaskets with the ball-peen hammer had the

potential to contaminate the workers' clothing?
A. Yes, sir.
Q. What did you find?
A. The clothing sample had, on average, 75 million asbestos structures per square foot of clothing.
Q. Back on the valve packing study did you determine whether or not there was any potential for contamination of clothing on the valve packing study?
A. Yes.
Q. What did you find?
A. That the maritime machinist who was doing this work -- the clothing sample that we took off of his work clothes showed a level of approximately 250 million asbestos structures per square foot of clothing.
Q. What was the percentage of asbestos that you found in that gasket material?
A. 60 percent by volume of chrysotile.
Q. And what was the percentage of asbestos in the valve packing? I keep jumping back and forth.
A. The 6AM?
Q. In your air sample test of valve packing. Did you test the percentage of asbestos in Valve Packing Study No. 2?

A. Well, we tested the concentration, the amount of asbestos that was in the valve packing, and it averaged about 50 to 60 percent by volume. And then the material that went back in, our study showed that it was approximately 70 percent by volume of chrysotile.

Q. And that was chrysotile?

A. Yes, sir.

Q. Now, on that test you didn't make any determination about whether or not it was contaminated.

A. That's correct.

Q. And when was the first time that you started doing the contamination test to determine the amphibole in the asbestos?

A. 2002, maybe. 2001, 2002.

Q. So the valve packing test was done before you started doing that tremolite --

A. More sensitive testing, yes, sir.

Q. Now, when Dr. Millette did the same test that you had done were his results comparable to what you found?

A. Yes, sir, they were, I thought, very consistent.

Q. What did he find in terms of the fiber

release from making gaskets with a ball-peen hammer?
A. His ball-peen hammer just fabricating the gaskets with a ball-peen hammer he averaged approximately 2.2 fibers per cc.
Q. Is that higher or lower than you had found?
A. It's just a little higher.
Q. And when he filed the gaskets what did he find?
A. His average on filing was 2.0 fibers per cc.
Q. And that was a little lower than you found?
A. Yes, it was a little lower since we filed all six of the gaskets, and he only filed two, so the protocol got changed a little bit there on his side.
Q. All right. What was the percentage of tremolite that he found?
A. I'll have to dig it out of here.
(There was a pause in the proceedings.)
THE WITNESS: He found 0.15 percent tremolite actinolite.
BY MR. HATTEN:
Q. Now, is that a little bit higher than what you had found?

A. That was higher than ours.
Q. Okay. Even though there are some light changes there, how would you compare those two tests?
A. I think for the fiber levels they're extraordinarily similar. To have the exact same study done in another facility with different personnel and have it this close I think is pretty good.
Q. Now, have you done a third study of gaskets?
A. Yes.
Q. And this time with Garlock gaskets?
A. I have.
Q. Now, who paid for the test, 2150 gasket material, the gasket test?
A. You paid for it.
Q. Right. Did I pay for this Garlock one?
A. No.
Q. Who paid for that?
A. Well, nobody paid for that. We were able to get some -- a big sheet of Garlock gasket and we did it ourselves to see if we could -- doing the exact same work procedures, how close the results or how far would they be away with a different manufacturer.
Q. All right. And the third time you did the test you did the same procedure?

MR. O'CONNELL: Objection; leading, suggestive.

BY MR. HATTEN:

Q. Did you do the same procedure?

A. The second time we've done the test --

Q. The second time you did it. Millette did it once, and you are doing it the second time?

A. We used the exact same protocol.

Q. And with the gaskets made by Garlock, were they of a similar composition?

A. Yes, sir, they were. They were found to contain 80 percent by volume of chrysotile.

Q. Okay. Did you do a tremolite test on them?

A. We have not finished that one yet.

Q. Okay. In the Garlock test what were the levels for the ball-peen hammer?

A. The -- just the ball-peen hammer, the personal samples were 1.3 fibers per cc.

Q. And you had had 1.4 on your previous test?

A. Actually, I looked at the average here, and it was 1.5.

Q. 1.5. So, is the 1.3 as opposed to the 1.5 -- again, was that -- how did that compare, in

your mind?
A. For this type of study, that's very, very close.
Q. For the filing?
A. For the filing we had 2.8.
Q. All right. How did that compare?
A. Again, that was very close.
Q. Okay. Now, as a scientist when you do a test on multiple occasions and you achieve similar results, what does that tell you about the validity of the test?
A. Well, the more you repeat the same test and get similar results, it tells you you have a very high confidence in your results; that you can demonstrate over and over again doing the same types of work practices -- generate the sameresults, so you can have a very high confidence in the study.
Q. Okay. Now, how did these numbers compare to background levels? Let's go back to the findings by Dr. Millette, 2.2 and 2.0. How does that compare to background?
A. Let me see what Dr. Millette's background levels were.
Q. Okay.
(There was a pause in the proceedings.)

A. Well, Dr. Millette's is hard to determine. He just has less than 0.01, but if you look at and accept 0.01, that would be approximately 200 times.

Q. Okay. And how about compared to your background?
Now, is this because of the -- why would that be a 0.01? What was the instrument used there?

A. Well, he has 0.01 -- he just has less than 0.01.

Q. Do you know what instrument he used?

A. That would be phase contrast microscopy. He just didn't report it, all the zeros. So, if I had his worksheet I could probably tell you what it is.

Q. All right. On your own fabrication of 2150 how many -- the three fibers per cc, how many times is that, then, the background that you measured?

A. Our background, on average, was 0.004 fibers per cc. So, the fabrication was about 1.5...

(Pause.)

For fabrication, our results were 3,750 times above background.

Q. And when you filed it?

A. Well, the filing was essentially almost double, so --

Q. It would be 7,000 times?
A. Yes, sir, above background.
Q. Now, as compared to the background of the United States Department of Labor and the average outdoors in the United States, if that was five zeros and a two for the -- according to the Department of Labor as to what the background is, how would your test results compare to that?
A. For our fabrication without filing it would be 750,000 times above background.
Q. All right. And for Dr. Millette's test how would that compare?
A. For Dr. Millette's, which I think his was 2.2, his would be approximately a million times above background.
Q. All right.
A. A million times that background.
Q. A million times what the Department of Labor says is the background level?
A. Right.
Q. Okay. Now, have you now also done testing to determine the potential of fiber release from removing gaskets?
A. Yes, sir.
Q. And what did you find, and how did you do

it?
A. Well, again, we had steam flanges that had been removed from a power plant in Oregon, and we hired a steam fitter, union steam fitter, that had worked in the field for 30 years, and he had retired, so we hired him to come in and trained him how to work in a confinement area with a respirator, and asked him to remove the gaskets just like he used to on the job. We took him to -- essentially, we took him to Lowe's and had him buy the tools, and he went inside the room, opened the flanges, and first used scraping and hand wire brushing and then used scraping and electric grinding, and we had him do it the same way he said he used to do it on the job. And we made the measurements doing that, and that would be gasket 4 and 5. Gasket studies 1,2, and 3 -- we've done a lot of gasket studies -- I actually did the gasket removal, and I'm not a steam fitter, and I've never been on the job and I did the removals. So, for gasket four we actually had a guy who had done it.

Q. So you had done studies before in which you did the work?
A Yes, sir.
Q. And this time you got --
A. A professional.

Q. All right. Now, what did you determine was the potential for asbestos release from these various activities of scraping, hand wire brushing and power brushing?
A. Just using the one study, even though, interestingly enough, all the studies were pretty consistent, even without the professional scraping the gaskets.
Q. Even the ones you had done?
A. Yes, sir, his results were on average a little higher than mine. But from his study, using the scraping and the hand wire brush, as I recall, it was about 2 to 4 fibers per cc, the potential for release when we did the study.
Q. Is this your study?
A. Yes, sir, it is.
Q. And what did you determine, 2 to 4 fibers for hand wire?
A. Yes, sir, 2.3 to 4.4.
Q. Now, is that higher than what you had found from making gaskets?
A. You know, with the actual spread in the analysis it's pretty close.

Q. About the same?
A. It's a little higher, but statistically I don't think there would be that much difference there.
Q. All right. What did you find from the power brushing was the potential for fiber release?
A. Now, that ranged higher. The low sample -- that was on the very first one he started -- was four fibers per cc, and the high one was 24 fibers per cc.
Q. How does that compare to the making gaskets and the valve packing?
A. They're all higher, much higher.
Q. Okay. Now, did you in any of these studies use the old method of counting particles instead of fibers so that you might be able to compare one to the other?
A. Yes, sir, we used the impinger method that was the standard test method in the '40s, '50s, and '60s.
Q. All right. And what did you find when you used the impinger?
A. For the scraping and hand wire brushing we found a level of eight million particles per cubic foot.
And we took another sample and we were

using the electric grinder, and that was much higher.
That was approximately 25 million particles per cubic

foot.
Q. 20-how-many? 25?
A. 25 million.
Q. How did that compare to the old level of five million particles per cubic foot?
A. Well, you can compare it a little. It's higher than five million particles per cubic foot, but
to be fair, that standard is a time-weighted average
Q. All right. So, did you ever use the impinger method for any of your other testing?
A. Yes, we have.
Q. What other testing have you used the impinger method for?
A. We've used the impinger method on our thermal insulation testing, our joint compound
testing, and a few others.
Q. All right. On the removal of gaskets did you test the clothing of the worker?
A. We did.
Q. And what did you find?
A. (Pause.)
I know it's in here. Hold on.
(There was a pause in the proceedings.)
THE WITNESS: The average concentration
on the clothing for the worker and for the helper was

approximately 1.3 billion asbestos structures per square feet of clothing.

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Q. Now, have you had an opportunity to see whether or not the Newport News Shipyard has done any tests which reached comparable results to what you did on this type of material?
A. Yes, sir, they did almost the same kind of activity.
Q. All right. Let me show you a document that's dated July 27, 1982.
A. Yes, sir, I've seen this.
Q. And can you explain what that study shows?
A. Well, they were using an angle grinder to remove gaskets off flanges, and it's the exact same tool we used. I called it a side grinder. And they took air measurements for the asbestos fiber amounts that were being released.
But one of the -- but the big difference here is when they did this study they soaked the gaskets on the flanges with wet rags to try to keep the dust down, and they also used local exhaust

ventilation, so they were actually trying to put some industrial hygiene techniques in to keep the fiber levels down.

Q. Did you do either one of those things in your own tests?

A. No, we did not.

Q. And what was the -- what were the test results that they found -- what was the potential for fiber release from the same activity that you had done?

A. Their results -- they had three results. They had 6, 10, and 29 fibers per cc. So their results are consistent with my results.

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Q. Did the shipyard do any other tests that you found were consistent with your own results?

A. Yes, sir, we have another study here that was done on one of the catapults with an angle grinder, a gasket that had a nickel -- a copper nickel sheathing around it.

Q. Were controls used on that?

A. They put it inside of -- they had a tent, but it doesn't look like they used any wetting procedures, et cetera. And they had a range of 0.6 to 8.6 fibers per cc.

Q. And is that in the range of what you had found from your own power grinding?
A. On the lower side, yes, sir. The 8.0 was consistent with the power grinding.
Q. All right. Now, how about the valve packing? Were there tests at the shipyard in the '80s, '90s?

A. Yes, sir, there was.
Q. And what were they?
A. Valve packing removal -- they had a range of 0.01 to 0.05.
Q. And was that with controls or without?
A. With controls.
Q. Was yours with controls or without?
A. Ours was without.
Q. And what were the types of things that they did to control the dust?
A. Cutting the pieces in plastic bags, wetted then cut inside of a bag, using clean-up. So, there were drop cloths, vacuum up the debris. This was just all cutting. So, they were cutting it with some controls.
Q And this was when? In the '90s?
A. '96.
Q. '96. This is after Mr. Oney left?
A. That would be correct. He left in '92, if I'm not mistaken.
Q. '94?
A. '94. Sorry.
Q. All right. Any other tests at the shipyard that were consistent with your own?

A. I have another study here -- they were removing gaskets from pipe flanges using just a hand scraper, with controls.
Q. When was that?
A. This was done in '98.
Q. Again after he left?
A. Correct. And they --
Q. And what were the findings?
A. They removed asbestos gasket from pipe flange using amended water and a hand scraper and a vacuum and a drop cloth, and according to this they had a peak exposure of 0.3 and a time-weighted average of 0.12 fibers per cc.
Q. 0.12?
A. Correct.
Q. Okay. Are all these numbers above background?
A. Yes, sir, they are, way above background.
Q. Way above. Are all these numbers way above background (indicating)?
A. Yes, sir.